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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-744

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the district court (Pet. App. A, 1A-2A), and its oral opinions of December 13, 1973, granting a temporary restraining order (App. 64-68),[1] and of December 21, 1973, denying a preliminary injunction and dismissing the complaint (App. 152-155), are not reported. The

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[1] "App." refers to the Appendix filed in this Court. "CA App." refers to the Appendix filed in the Court of Appeals.

opinion of the court of appeals (Pet. App. B, 3A-17A) is reported at 499 F.2d 527.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act (26 U.S.C. §7421(a)) prevents a district court from enjoining the Internal Revenue Service's seizure of all of a foreign citizen's assets in the United States where the seizure is deliberately made (a) without the prescribed statutory notice, (b) for law-enforcement purposes unrelated to revenue collection, and (c) at a time when the taxpayer would be effectively prevented from challenging the factual basis for the asserted tax liability underlying the seizure.

2. Whether a district court is prohibited by the Anti-Injunction Act from directing the Internal Revenue Service to produce some facts, under oath, to justify a seizure of all of a taxpayer's assets based on an allegation of continuous criminal activity where the taxpayer has denied the criminal activity under oath and has explained, in his own affidavit and that of a supporting witness, where he lawfully obtained the funds alleged by the IRS to have been derived from unlawful activity.

STATUTES INVOLVED

The relevant statutes appear in the Appendix to the government's brief (pp. 37-40).

STATEMENT

1. The Agreement to Surrender for Extradition[2]

Samuel Shapiro is an Israeli citizen who lived openly in the United States between late 1970 and May 1974. He is married to the other plaintiff in this action, who is a native citizen of the United States. In November 1972, the State of Israel requested Mr. Shapiro's extradition to face charges in Tel Aviv District Court of conspiracy and having taken money by false pretenses.[3] Mr. Shapiro's extraditability was thereafter litigated in the Southern District of New York and in the Court of Appeals for the Second Circuit.[4] Throughout the course of these extradition proceedings – and throughout the course of the later negotiations entered into among Mr. Shapiro's counsel, the Department of Justice, the Department of State, and the State of Israel, as set forth hereinafter – Mr. Shapiro was required to post funds presently within the United States in banks as security for his appearance.

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[2] Most of these background facts are alleged in the verified complaint instituting their action (App. 8-15). In reciting them below, however, we make reference to the more complete Appendix filed with the court of appeals.

[3] The charges grew out of an investment company operated by Mr. Shapiro and a partner in Israel. It was alleged that the partners had represented to investors that their investment company was a bank. The company was unable to repay investors, who suffered, according to the Israeli indictment, a total loss of about $55,000.

[4] See *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973); *Shapiro v. Ferrandina*, 355 F. Supp. 563 (S.D.N.Y. 1973); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973).

After the decision of the court of appeals which found for Mr. Shapiro on some issues but held him extraditable, a petition for certiorari was filed with this Court. It was docketed as No. 72-1701.[5] Discussions between counsel for Mr. Shapiro and representatives of the Department of State were then had to seek to effectuate an agreeable resolution of the request for extradition under which Mr. Shapiro would surrender voluntarily and return to Israel to stand trial. It was explained to attorneys of the Department of State that Mr. Shapiro was confident that he would be acquitted but was concerned that his departure for Israel would affect the health of his wife, who was then expecting the couple's first baby and that the Israeli Government might refuse to release him on bail for an extended period until his trial was held.[6]

With the agreement of Mr. Shapiro's counsel, attorneys for the Office of the Legal Adviser of the Department of State communicated with the Embassy of Israel to see whether the case could be amicably resolved under these conditions. A Diplomatic Note dated August 16, 1973, was delivered to the Embassy of Israel asking whether it would approve of these conditions (CA App. 201-202).[7]

[5] This Court refused, at that juncture, to stay the extradition pending decision on the petition, but the Department of State did not attempt to have Mr. Shapiro extradited immediately.

[6] Mr. Shapiro is the nephew of a deceased Minister of the Interior, whose party (the National Religious Party) has been subjected to vicious criticism by a vociferous political party that publishes a weekly scandal-sheet (*Haolam Hazeh*). The sheet featured many biased and unfair stories about Mr. Shapiro and demanded his return and imprisonment.

[7] The note stated that the petition for certiorari (then pending) would not be acted upon until October, and possibly not until January. It went on to say (CA App. 201-202):

(cont'd)

On September 4, 1973, the Embassy of Israel replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for a writ of certiorari and the voluntary surrender of Mr. Shapiro. The three conditions were that extradition would be delayed until after the birth of Mr. Shapiro's child and the religious ceremonies incident thereto, that Mr. Shapiro would "be allowed to remain at-large in Israel until acquittal or conviction," and that the trial in Israel would not be interrupted by extended delays.[8] On September 21, 1973, in answer to a letter sent directly to the Attorney General of Israel, Mr. Shapiro's lawyer was told that Mr. Shapiro

(Footnote 7 cont'd)

> In addition, Mr. Lewin [Shapiro's counsel] has indicated that he will initiate a second lawsuit if the Secretary signs a warrant of surrender in this case. This second suit will seek an injunction and will raise questions regarding the procedure followed within the Department when an extradition magistrate has found a person extraditable. Mr. Lewin believes that such a person must be granted a new hearing within the Department and an opportunity to present oral and written arguments.
>
> The Department does not believe that Mr. Lewin presents a strong case. However, the Department would rather not be subjected to a lawsuit. If this can be avoided.
>
> All of this litigation may delay Mr. Shapiro's extradition indefinitely. The Department therefore forwards Mr. Lewin's letters with the hope that all litigation in the United States will cease if the Government of Israel can respond favorably to Mr. Lewin's request.

[8] CA App. 267. The quote is from the State Department's letter of September 19, 1973, to Mr. Shapiro's counsel.

would be released on bail of 250,000 Israeli pounds (approximately $60,000) when he returned to Israel (CA App. 213).

On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the petition for writ of certiorari (CA App. 268), Mr. Shapiro's counsel drafted and submitted for signature by the Solicitor General a stipulation later signed by the Solicitor General for the United States and by Mr. Shapiro's counsel, withdrawing the petition (CA App. 269).

On November 16, 1973, pursuant to the agreement among counsel and with the Government of Israel, Mr. Shapiro's attorney notified the Department of State that a daughter had been born to Mr. and Mrs. Shapiro. Thereafter, as the result of many discussions over several days with representatives of the Department of State, the Department of Justice, and the Government of Israel, it was agreed that Mr. Shapiro would voluntarily surrender for extradition to Israel on Sunday, December 9, 1973. Arrangements were made for the surrender date with the Government of Israel and with the Department of Justice, which assigned a Deputy United States Marshal to be at the United States Courthouse on that day officially to surrender Mr. Shapiro to an agent of the Government of Israel.

During the course of these discussions, Mr. Shapiro's counsel made clear that in order to post the bail required by the State of Israel, Mr. Shapiro would have to utilize the funds currently pledged as security for his appearances in the proceedings before the Immigration and Naturalization Service and the district court. At the suggestion of an official of the Embassy of Israel, arrangements were

made with an Israeli Bank – Bank Leumi – to have these funds deposited, on their release by U.S. authorities, in the New York branch of Bank Leumi as partial security for that Bank's guarantee in Israel of the bail to be posted upon Mr. Shapiro's return to that country. In a letter dated November 27, 1973, Mr. Shapiro's counsel made reference to the need to use the bond security for bail in Israel (CA App. 238).

Pursuant to these arrangements, Mr. Shapiro and acquaintances arranged that upon his surrender for extradition, assets he had in the United States, including bank accounts which had been posted as security insuring his appearance in judicial proceedings and proceedings before the Immigration and Naturalization Service, would be deposited with the offices of Bank Leumi.

2. The Sudden IRS Seizure

On the afternoon of Thursday, December 6, 1973, without any prior notice or warning whatever, agents of the Commissioner of the Internal Revenue served on banks in New York where Mr. Shapiro maintains accounts and safety deposit "Notices of Levy" pursuant to Section 6331 of the Internal Revenue Code (App. 22-29). No notification of the levies was given Mr. Shapiro nor were copies of the levies provided until several days later, when his counsel appeared in New York at a meeting with the IRS agents.[9] The notices recited that assessment had been made on that same day. During the entire extradition litigation, there

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[9] Mr. Shapiro learned of the levies only because one of the banks, as a courtesy, telephoned him and told him that it had been served with these papers.

had been not the slightest suggestion that Mr. Shapiro was subject to any tax liability or that his tax returns were being investigated.

The IRS agents knew, prior to the service of these Notices, that Mr. Shapiro was the subject of extradition proceedings and was to be surrendered to the State of Israel on December 9, 1973 (App. 129-130). The agents also could have learned with minimum effort that the levied funds were, at the time of levy, being utilized by Mr. Shapiro as security for his bonds in the United States and that he planned to use the funds for security in Israel.

On December 6, 1973, and on Friday, December 7, 1973, Mr. Shapiro's counsel spoke to representatives of the Department of Justice and the Department of State and set forth his views, *inter alia*, that the intervening actions of the IRS violated the agreements concluded pursuant to which Mr. Shapiro had agreed to surrender his right further to litigate the matter of extradition and constituted gross bad faith on the part of the government of the United States (App. 12-13).

Officials of both Departments advised counsel that they had no prior notice of the actions of the IRS and they were "surprised" or "shocked" by these actions. On December 7, 1973, the State Department informed counsel that as a result of the intervening actions of the IRS, the Israeli Government was prepared to postpone the extradition of Mr. Shapiro until Sunday, December 16, 1973, in order to give Mr. Shapiro an opportunity to resolve this matter with the IRS (App. 13).

Mr. Shapiro's counsel met on Monday, December 10, 1973, in New York City with three agents of the Internal Revenue Service to ascertain the basis for the IRS claim

and discuss a possible resolution of the matter. Despite repeated requests, counsel was unable to ascertain from these agents the basis for the IRS claim of taxes due. Counsel proposed to these agents that an agreement be entered into whereby the funds presently under levy (approximately $35,000) be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of Mr. Shapiro's bond, with the United States to have a security interest in those funds second only to the State of Israel. Counsel was directed to embody this proposal in a letter. Pursuant to this instruction, the letter attached to the Complaint as Exhibit IV (CA App. 272-76) was sent air mail, special delivery, to Mr. Victor Godfrey, District Director of Internal Revenue. Appendix D, pp. 24a-29a, *infra*.

On December 12, 1973, counsel had delivered by hand a copy of this letter to the State Department along with a cover letter dated December 12, 1973, and attached to the Complaint as Exhibit V (CA App. 277-78). Counsel therein requested a further delay of the extradition until the IRS responded to the proposal and, if it was refused, until the judicial resolution of the tax liability. Counsel was subsequently informed by the State Department that extradition would not be postponed.

3. Legal Action is Instituted

This action was begun on December 13, 1973, to challenge the combined action of governmental officials who had, as of that date, arranged for Mr. Shapiro's imminent forced departure and had, at the same time (through another agency of the government) summarily seized all his assets. The complaint alleged that these acts had unconstitutionally deprived Mr. Shapiro of the right to contest the tax

liability and that the delay until just before his extradition "was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto" (App. 14). It was also alleged that the acts of the IRS had violated "the express and implied promise of the United States not to interfere with [Mr. Shapiro's] release on bail" (App. 15). It was finally alleged that the effect of the defendants' actions was to leave Mrs. Shapiro with an infant whom she would be unable to support, all of which constituted a violation of both plaintiffs' Fifth Amendment rights (App. 15). The complaint asked that the Notices of Levy be lifted or, alternatively, that the Attorney General and Secretary of State be enjoined from carrying out Mr. Shapiro's extradition until the matter of the tax liability was adjudicated (App. 15-16).

A hearing on the application for a temporary restraining order was held before Judge Richey on the afternoon of December 13, 1973.[10] At the conclusion of that hearing Judge Richey entered a temporary restraining order and set a further hearing for December 19, 1973 (App. 64-70).

4. Criminal Allegations are Belatedly Made

During all this time, the government was refusing to disclose what the basis was for its tax claim against Mr. Shapiro. At the hearing of December 13, the district court specifically inquired as to the basis for the levies in this case (App. 38):

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[10] The transcript of the hearing is reproduced at App. 30-70.

THE COURT: Can you tell me the bases for a levy?

MR. FUERTH: For a levy or for an assessment sir?

THE COURT: Well, for a levy and assessment here.

MR. FUERTH: The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

THE COURT: Do you have any evidence that you can present to the Court to verify that?

MR. FUERTH: No, Your Honor, not today.

Your Honor, if I may suggest – and I am prepared to make an argument on that – I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

And, at the same hearing, the IRS implied it intended to take the full sixty days allowed it under Section 6861(b) before issuing the required Notice of Deficiency (App. 39).

Mr. Shapiro's counsel served interrogatories on December 17, 1973, which asked, *inter alia,* "the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro" (App. 74). When the government declined to respond prior to the hearing scheduled for December 19, 1973, counsel moved to shorten the allowed time for a response (CA App. 279-281). A hearing on this motion was held on December 18, 1973 (App. 77-90), at which the court ordered that "the government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide" (App. 86).

The government's answers, served on December 19, 1973, objected to the interrogatory requesting the amount of the deficiency (App. 131):

> This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provisions of Section 6861(b) not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such, the information sought herein is irrelevant and immaterial to the matters presently before the Court.

At the December 19th hearing on the motion for a preliminary injunction – as during the earlier hearing – the government insisted that it had until February 4, 1974, to serve its notice of deficiency stating its ground, and Mr. Shapiro could then challenge that deficiency in the Tax Court (App. 110, 115). The district court took the matter under advisement, continuing the restraining order until it would rule on the preliminary injunction motion, which, Judge Richey said, he could do on the next day (December 20, 1973) (App. 127).

On December 20, 1973, Judge Richey advised the parties that he would issue his decision on December 21 at 3:00 p.m. At 12:20 p.m. on December 21, Mr. Shapiro's counsel was served with a supplement to the earlier answers to interrogatories to which were attached copies of Notices of Deficiency for the tax years 1970 and 1971 (App. 132-136). The deficiency alleged therein for the income tax year 1970 was $5,137.89, based on "unexplained

bank deposits at the 1st National City Bank in the amount of $18,000.00" (App. 135). The deficiency alleged for the 1971 tax year was "unreported taxable income in the amount of $137,280.00 . . . from your activities as a dealer in narcotics . . ." (App. 136). The only further explanation for the income figure was the assertion that Mr. Shapiro realized $381,680.00 in gross income from hashish sales during the year 1971. Mr. Shapiro's flat denial of the charge that he was a narcotics dealer was reported to the district court at the hearing held on the afternoon of December 21 (App. 138).

At the hearing, Mr. Shapiro's counsel pointed out that the government's last-minute allegation of illegal narcotics activity made it all the more essential that he be permitted to remain here to contest the tax claim and any criminal charge that should be filed if the government was serious in its allegation. The government's response, once again, was that the court "lacked jurisdiction" (App. 140).

5. The Action is Dismissed

After more argument, Judge Richey announced that he had "with reluctance" and "with some difficulty," come to the conclusion that the court lacked jurisdiction (App. 153). Regarding the extradition, the court ruled it lacked jurisdiction because Mr. Shapiro's extraditability had been decided in the Southern District of New York and by the Court of Appeals for the Second Circuit, and jurisdiction over the U.S. Marshal in New York was lacking. Regarding the jeopardy assessments, the court ruled (App. 154-155):

> I want to say here and now, in view of what the Court has learned today, that the Government was aware from the time this

suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish.

For the like of me, I cannot understand why that was not made known, although perhaps the Government was under no obligation to do so.

* * *

I think upon careful consideration, upon all the facts in the entire record, that this case does not amount to a violation of due process. It does not fly in the face of the Enoch standard as claimed by able counsel for plaintiff.

* * *

While the Government would preferably have made known the basis for its claim, I don't think that it is necessarily fatal or tantamount to a denial of due process for its failure to disclose such a basis for its assessment before now or until February 4th, at least.

So we come down to the fundamental question, as the Court has indicated, as to whether the Court has jurisdiction; and the Court finds that it does not.

As to the due process claim of the plaintiffs, the Court will say this: The standard is whether the Government has a chance of

ultimately prevailing on the basis of the information available to it and available to the Court. And only if it is apparent under the most liberal view of the law and the facts that the United States cannot establish its claim, may a suit for an injunction be maintained.

Now, that is a principle of law laid down in Enoch; and I just don't find and cannot find, as much as I really do not like the activity of the Government in this case – I will tell you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before this man's departure – but, nevertheless, looking at it from the most liberal point of view and in the most liberal light as to the law and facts in favor of the plaintiff, I don't see how the Government can fail to establish its claim; and I think the suit for injunction and the other relief must be denied.

That means that the Court is without jurisdiction and the preliminary injunction will be denied.

6. Proceedings Pending Appeal

The court of appeals granted an Emergency Application for a Continuation of Judge Richey's original order on December 26, 1973. On January 3, 1974, Mr. Shapiro filed in Tax Court for a redetermination of the deficiencies alleged by the IRS. *Shapiro v. Commissioner*, No. 178-74 (App. 161-162). Although the Tax Court petition

was short and directly challenged the IRS, no answer or responsive pleading was filed until the full 60-day period for a responsive pleading elapsed. In order further to expedite resolution of this case, Mr. Shapiro's counsel had the record in the court of appeals docketed long before the 40 days authorized by the Federal Rules of Appellate Procedure.

There the matter sat – awaiting timely briefing and argument in the court of appeals – until, on February 21, 1974, the government filed in the court of appeals a motion to vacate the stay order, alleging that any delay in Mr. Shapiro's extradition was "exacerbating the situation relative to the United States' discharge of its treaty obligations to Israel." Attached to the motion was an affidavit by a State Department official saying that Israel was "concerned by the present delay" in Mr. Shapiro's extradition and a copy of a note from the Israeli embassy stating that it had "acted on the recommendations and advice offered by the Department of State" in this matter and that it "would greatly appreciate it if the department were now to ensure that this matter is brought to a close."[11]

The court of appeals thereupon issued an "oral communication" indicating that it would extend the stay for an additional ten days to allow for further negotiation with Israel "in light of the IRS's actions of December 6, 1973." On the day following that communication, Mr. Shapiro's counsel submitted to the Israeli Government, pursuant to a meeting with attorneys representing the Departments of

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[11] The government did not explain to the court of appeals why if the matter was of such great urgency, it had waited twelve days since receipt of the note (stamped in on January 9) to submit it to the court.

Justice (Criminal Division, Tax Division and Office of the United States Attorney) and State, three distinct proposals whereby its interest in prompt extradition could be reconciled with the still undetailed claims of the IRS (CA App. 303-305; see Appendix G, pp. 64a-67a, *infra*). Israel unconditionally rejected all proposals. Accordingly, on February 12, 1974, the court of appeals lifted the stay it had previously entered and set the case for oral argument on March 1, 1974. An application for a further stay filed with this Court was held without decision until the court of appeals resolved the appeal, when it was dismissed as moot. October Term 1973, No. A-788.

7. The Decision of the Court of Appeals

The court of appeals, in a unanimous opinion issued on May 15, 1974, held first that there was no jurisdiction to enjoin the extradition (Pet. App. 6A-7A). With respect to the jeopardy assessment, it held that dismissal of the action was "premature," and that Mr. Shapiro should be given an opportunity to establish the factual basis for his claim (Pet. App. 7A). The court ruled that a taxpayer is entitled to enjoin IRS action when it is, in fact, an "exaction in the guise of a tax" (Pet. App. 10A). Citing decisions of the Second and Fifth Circuits that had permitted injunctions against IRS collection procedures based on tax claims that are "entirely excessive, arbitrary, capricious, and without factual foundation," the court held that the complaint, fairly construed (in light of its having been filed *before* the allegation of criminal activity was made), amounted to a denial of the charge and a claim that the IRS' liability was arbitrary and excessive (Pet. App. 12A).

Consequently, said the court of appeals, the district judge "might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency" (Pet. App. 13A). The court concluded that "at the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be 'an exaction in the guise of a tax' " (Pet. App. 16A). The case was remanded for further proceedings on this factual issue. Also available on remand was the question raised by the court in footnote 12 of its opinion – whether the tax levies were valid in light of the IRS's failure to provide prior notice and demand for payment of taxes due (Pet. App. 8A-9A). Nowhere in its opinion – either expressly or impliedly – did the court of appeals endorse the proposition which the government has stated as the "Question Presented" in this case – *i.e.*, that "the Commissioner of Internal Revenue is required to prove the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable" (Petition for Certiorari, p. 2; Brief for the Petitioner, p. 2).

Several days after the court's decision, Mr. Shapiro surrendered and was extradited to Israel. We have been advised that on his arrival there, the requested bail was reduced (notwithstanding the earlier refusal to make this accommodation), and that an Israeli relative offered to post an apartment as partial security for his appearance. Consequently, he was released on bail. We have also been told that as of this date – some 18 months after his return was again urgently requested by the Israeli Government – Mr. Shapiro has still not been put to trial, nor has Israel taken any formal steps directed at a trial on the criminal charges.

8. Proceedings After the Court of Appeals Decision[12]

On May 29, 1974, the government filed a petition for rehearing with the court of appeals in which it argued, in substance, that the court of appeals' decision conflicted with this Court's then-recent rulings in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). The court of appeals denied that petition on July 17, 1974. The government then requested a stay of the mandate, asserting that "serious consideration" was being given to the filing of a petition for writ of certiorari. On August 12, 1974, the court of appeals denied the request for a stay. Similar relief was thereafter sought in the district court, and it was substantially denied on September 19, 1974.

Unaware that the government had filed a petition for rehearing on May 29 (the day the mandate was to issue on the original decision of the court of appeals), Mr. Shapiro's counsel served, on that day, a motion for summary judgment in the district court entirely on the ground discussed in footnote 12 of the court of appeals' opinion – *i.e.*, that the failure to provide notice and make a demand for payment totally invalidated the IRS levy. Appendix A, pp. 1a-7a, *infra*. This motion was held by the district court until the mandate of the court of appeals had issued.

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[12] These proceedings are obviously not a part of the record here on certiorari. However, the government's petition and brief dwells on them at great length. Consequently, we are providing our own account to give the Court the entire picture and as a basis for our own argument.

Thereafter, the district court ordered that a response to the motion be filed on or before October 10, 1974.[13]

In response to the motion for summary judgment, the government asserted that it had mailed notices and demand for payment on December 6, 1973 – the very same day on which it served notice of levy on Mr. Shapiro's banks. Appendix B, pp. 8a-21a, *infra*. The government thereupon admitted that the levies "may be technically defective," but argued that the assessments were properly made and that new notices of levy would be promptly served to remedy the defect.

Attached to the government's response was an affidavit from the Director of The Brookhaven Service Center of the IRS stating that "the official records" showed that on December 6, 1973, Treasury Forms 17-A "were mailed to Samuel Shapiro giving him notice of and making demand for payment of said jeopardy assessments." The affidavit did *not* explain:

(1) Why Mr. Shapiro had never received any such notices;

(2) Why the photostated copy attached to the affidavit and purportedly taken from the IRS file *was the taxpayer's copy*, marked as the one to be retained by the taxpayer for his own records;

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[13] The order provided – at respondent's suggestion – that if the Solicitor General advised the district court by October 1, 1974, that he intended to file a petition for certiorari in this Court, all proceedings would be stayed. No notice to that effect was issued or received; consequently, no stay took effect. If the court of appeals' decision was so clearly wrong and so clearly harmful, one wonders why this opportunity to obtain an automatic stay was missed.

(3) How the cryptic form, if it had ever been received, was to be understood by the taxpayer as a meaningful demand.

On October 11, 1974, new levies were served on five banks where Mr. Shapiro had had assets. On October 29, 1974, the court denied the motion for summary judgment as "moot" because "the government has effected a second set of levies upon Plaintiffs' assets." Appendix C, pp. 22a-23a, *infra*. The district court simultaneously ordered the government to file with the court

> The factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculations of the deficiency has a rational basis, so that the Court can determine if the claim is "entirely excessive, arbitrary, capricious, and without factual foundation."

A "factual submission" was submitted, pursuant to court order, on November 8, 1974. It consisted of a revenue agent's affidavit which asserted various undisputed facts – such as that Mr. Shapiro had filed no tax return for 1970 but had filed a return for 1971, that he had certain bank accounts with certain amounts on deposit, and that he had purchased an automobile and a home. The critical paragraphs of the affidavit then stated that "information supplied to the Internal Revenue Service indicated" that Mr. Shapiro had smuggled hashish into the United States in 1971 and that an unnamed individual, of unknown reliability, who had been convicted of selling hashish stated that he had made six deposits to Mr. Shapiro's account at irregular occasions between mid-April and mid-August 1971, in a total amount of $14,900, and that these "transfers"

were for hashish. The affidavit then went on to say that the "known practice in hashish trafficking" was to deal in full kilos, that the wholesale cost per kilo in 1971 was approximately $2350, and that the "common practice" was for hashish dealers "to receive payment in two parts – the first for cost and the second for profit." There was no explanation as to how the six irregular payments – in amounts varying from $1500 to $5600 – fit into this "common practice" or coincided with the known wholesale cost.

At a hearing on November 12, Mr. Shapiro's counsel submitted additional documentation explaining the source of funds used by the respondent in the United States. The court indicated that the anonymous references in the affidavit were inadequate, and that the informant would have to be further identified or examined. There had also been no rational explanation of the IRS' total extrapolation for a full year's alleged narcotics sales. The government thereafter advised the court that it would submit no further information. Judge Richey did not, however, enter judgment for the respondent. Instead, he issued an order on December 18, 1974, governing further discovery in the case. (Br. in Opp. App. C, 3a-4a).

On January 3, 1975, after the government's petition for certiorari had been filed in this Court, the court of appeals stayed all further proceedings and directed that the certified copy of its judgment be returned.

INTRODUCTION AND SUMMARY OF ARGUMENT

On its own facts, this case does not present the broad issue the government has brought here. Nor does it even necessitate resolving the question which the court of appeals

addressed squarely – and decided consistently with considered rulings of the Second and Fifth Circuits. The proceedings that followed the decision of the court of appeals demonstrated unequivocally that the IRS has moved in an unlawful manner against the assets held by Mr. Shapiro in the United States. Consequently, this Court may affirm the judgment below merely because the assessment and levy procedures were so clearly invalid under the governing statutes that the seizure of Mr. Shapiro's assets should be vacated by the district court. At the very least, enough of a showing has been made to warrant consideration of this issue.

If the Court goes beyond this most narrow ground for decision, it must sustain the judgment below because there is more than ample proof in the record that the objective of the IRS in seizing Mr. Shapiro's assets was not tax collection or preserving revenue. The Anti-Injunction Act was not designed to give the Commissioner roving powers to harass, in a manner that would be unconstitutional if done by any other government official, those whom he or his subordinates believe have committed crimes.

In our Argument, we present our contentions relating to the absence of notice and demand and to the bad-faith character of the jeopardy assessment before turning to the broader issue tendered by the decision below and by the "Question Presented" in the government's briefs. We do so because we believe that the facts of this case are so extreme and demonstrate so cavalier a disregard of taxpayers' rights by the IRS that this court should not accept the government's invitation to treat it as an ordinary revenue-collection matter in which the Commissioner is being asked to make unnecessary disclosures that Congress wished to keep out of the courts. Thus, we first urge on the Court the most limited grounds of decision.

If, however, the Court were to disagree with our evaluation of the conduct of the Internal Revenue Service and were to conclude that it should consider whether the Anti-Injunction Act permits district judges to entertain challenges to jeopardy assessments which are squarely controverted by taxpayers who claim that they are factually baseless and arbitrary, we argue below that no standard lower than that applied by the court of appeals is correct. Where the effect of a seizure pursuant to a jeopardy assessment is as devastating as it is here (*i.e.*, where it involves an individual who is about to be forced out of the United States, perhaps forever), where the assessment rests entirely on an allegation of criminal activity, where the taxpayer's *total* available assets are seized, and where the alleged criminality is squarely denied under oath by the taxpayer (who also provides other corroborative proof), there is reason to be concerned that the government is obtaining an "exaction in the guise of a tax." If the Anti-Injunction Act is read to foreclose judicial scrutiny at this juncture, it is subject to grave constitutional doubts. For the effect of a rule that forces such a taxpayer to surrender all his funds and leave the United States on a totally unsubstantiated charge of criminal activity is to forfeit his property without the process of law that is due him under the Fifth Amendment.

Neither we nor the court of appeals maintain that, even in such extreme circumstances, the Commissioner must establish by a preponderance of the evidence that his facts are true. But we do believe that if the Fourth Amendment protects "papers and effects" against government seizure by a criminal investigator or prosecutor on less than probable cause, the Internal Revenue Service – whose statutory functions are primarily civil and whose operations are limited to revenue collection – can claim no

greater right to unsubstantiated and *ex parte* appropriations. If the government wished to secure from Mr. Shapiro a piece of physical evidence or a document evidencing his alleged criminal activity in order to prevent its being removed from the United States, it would have to prove much more than it did with the meager affidavit that the revenue agent submitted on November 12, 1974. It makes no sense whatever to permit the government to seize all of Mr. Shapiro's valuable assets on an *ex parte* conclusion of continuing illegality, when it may not seize a single "paper" or "effect" on less than probable cause.

The standard used by the court of appeals may not even amount to probable cause. Contrary to the repeated assertions of the government, no ultimate burden of proof was cast upon the IRS. The *sole* issue to be resolved on remand under the court of appeals' mandate is whether the IRS action was arbitrary and excessive and "whether there are any facts from which good faith may be inferred" (Pet. App. 16A). We believe this standard is too generous to the government in light of the Fourth Amendment rule. At all events, we surely cannot see how anything less can be demanded if we are to live under a rule of law, not under a system whereby totally unsupervised official judgments are given binding effect.

ARGUMENT

I

SINCE THE IRS PROCEDURES WERE PATENTLY INVALID UNDER THE INTERNAL REVENUE CODE, THE ANTI-INJUNCTION ACT DOES NOT BAR A JUDICIAL REMEDY

A. The failure to provide notice to the taxpayer and make a prior demand for payment wipes out the lien and levy collection mechanism utilized by the IRS.

In *United States v. Hall*, No. 74-75, and *Laing v. United States*, No. 73-1808, restored to the calendar for reargument, this Court is considering the question whether the IRS must issue a notice of deficiency to a taxpayer whose tax year is terminated by the Commissioner pursuant to Section 6851 of the Internal Revenue Code. Courts have divided on that question, and their differences have centered on the interpretation to be given to Section 6851. The government argues in its joint brief in those cases that a district court may not, under the Anti-Injunction Act, enjoin collection of taxes pursuant to a Section 6851 termination where no deficiency notice is issued "because the Commissioner is not required to issue such a notice after his termination of a taxable year under Section 6851 "(Brief for The United States, Nos. 74-75 and 73-1808, p. 14). It appears to be conceded, however, that if Section 6851 did require the issuance of such a notice, the Anti-Injunction Act would not be a bar to a suit based upon the IRS' failure to follow the statutory procedure.

This conclusion is, of course, mandated by the prefatory exception to the Anti-Injunction Act. Section 7421 begins with the words, "Except as provided in Sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1). . . ." Section 6212, in turn, authorizes the sending of a deficiency notice and

prohibits additional deficiencies, after such a notice is mailed. The last sentence of Section 6213(a) – more directly in point here – permits the bringing of an injunction action against an assessment or levy, "[n]otwithstanding the provisions of section 7421(a)," before a deficiency notice has been mailed and the time for petitioning in the Tax Court has expired (or while the case is *sub judice* in the Tax Court). During this period, in an ordinary tax case, the Commissioner may not assess or collect pursuant to levy.

The exception to this flat prohibition that appears in the beginning of the second sentence of Section 6213(a) is "[e]xcept as otherwise provided in section 6861 . . . " only when and if the procedure provided in Section 6861 has been followed may assessment and collection occur before there has been service of a notice of deficiency and an opportunity to challenge that deficiency. If the statute's conditions are not satisfied – as is true with Section 6851 collections – assessment and collection may be enjoined notwithstanding the Anti-Injunction Act.

This brings us to the requirements of Section 6861, under which the Commissioner purported to act here. Subsection (a) authorizes the Commissioner to act when he "believes that the assessment or collection of a deficiency . . . will be jeopardized by delay. . . ." If he has such a belief, he may "immediately assess such deficiency . . . *and notice and demand shall be made* by the Secretary or his delegate for the payment thereof" (emphasis added).

The "notice and demand" specified in Section 6861(a) has been held to be a condition precedent to a valid assessment. See *Steiner v. Nelson*, 259 F.2d 853, 858 (7th Cir. 1958). And the "notice" of such an assessment is not to be confused with the Notice of Deficiency required by Section 6212(a) (which is separately provided for in Section

6861(b)). See *United States v. Ball*, 326 F.2d 898, 901 (4th Cir. 1964).

An "assessment" is ordinarily nothing more than the recording of a taxpayer's liability in the records of the IRS. See 26 U.S.C. § 6203.[14] In the ordinary case, "notice and demand" for a tax is made shortly *after* an "assessment." A "jeopardy assessment" differs from the usual case only in the summary manner in which assessments and the "notice and demand" for payment of the tax may be issued. There is no provision in the Internal Revenue Code that otherwise exempts "jeopardy assessments" made under Section 6861 from the usual lien and levy procedures prescribed by the Code.

Section 6321, which sets out the preconditions for a valid tax lien, provides that a lien is to arise in favor of the United States "[i]f any person liable to pay any tax neglects or refuses to pay the same *after demand* . . ." (emphasis added). While Section 6322 also specifies that the lien arises "at the time the assessment is made," the effect of the two sections is to impose a *pair* of preconditions that must be met if the lien is to be valid, "The lien arises only upon the fulfillment of these conditions." *In re Holdsworth*, 113 F. Supp. 878, 879 (D.N.J., 1953).

The "levy and distraint" section – Section 6331 – similarly fixes conditions precedent for lawful seizure of a taxpayer's property. It states that "[i]f any person liable to pay any tax neglects or refuses to pay the same *within 10 days after notice*

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14 "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. . . ."

and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . ." (emphasis added). The concluding sentence of subsection (a) specifies that in instances of jeopardy, "notice and demand for immediate payment of such tax may be made by the Secretary or his delgate and, *upon failure or refusal to pay such tax*, collection thereof by levy shall be lawful without regard to the 10-day period provided in the section " (emphasis added).

In this case, there is substantial doubt whether "notice and demand" was ever made of Mr. Shapiro. He denied having received the Treasury Form 17-A which was allegedly sent on December 6, 1973, and the fact that *his* copy was in IRS files corroborated his claim that no such document was sent to him. Moreover, even the form contained in the file did not request *immediate* payment, as authorized by Section 6331(a). The legend on the bottom left-hand side of the form (Appendix B, p. 12a, *infra*) read (emphasis added):

> This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" *within 10 days* from the date of this notice.

As is true of the other related provisions of the Code, Section 6331(a) establishes an inflexible precondition:

> A levy is authorized only when a taxpayer "neglects or refuses" (after 10-day notice and demand), or upon "failure or refusal" (after jeopardy finding, notice and demand), to pay any tax for which he is liable.

Mrizek v. Long, 187 F. Supp. 830, 835 (N.D. Ill., 1959).

The verified complaint in this case was entirely clear on the matter of lack of notice and demand. See App. 11-12 (emphasis added):

> On December 6, 1973, *without any prior notice or warning whatever*, agents of the Commissioner of the Internal Revenue served on banks in New York where the plaintiff maintains accounts and safety deposit boxes and, on information and belief, on all institutions where his assets may be located, Notices of Levy pursuant to the jeopardy assessment provisions of § 6861 of the Internal Revenue Code. After several hours of seeking to discover on the telephone precisely what the nature of these liens was, plaintiff's counsel was informed at approximately 5:15 p.m. by Mr. Edward Hanley, a group manager with the Office of the District Director of Internal Revenue for Manhatten that the jeopardy assessments claimed liabilities of $6,843 for 1970 and a figure in excess of $83,000 in 1971.

This allegation, even if it stood alone, warranted the court of appeals' remand to the district court, and it now necessitates a lifting of the levy and assessment.

The IRS conceded in its response to respondent's motion for summary judgment that the levies served on December 6, 1973 were defective (Appendix B, p. 8a, *infra*):

> As can be seen from the affidavit attached hereto as Exhibit A, notice of and demand for payment of the jeopardy assessments was made on December 6, 1973. The records of the Internal Revenue Service apparently do not reflect at precisely what time the notices and demand for payment of the jeopardy assessments were placed into the United States

> mails. Thus, although the notices and demand were made and the levies served, all within a few hours of each event, we are unable to ascertain whether the notices and demand were given before, contemporaneously with, or after the service of the levies. *Accordingly, the Commissioner of the Internal Revenue Service, is now willing to concede that the levies served on December 6, 1973, were defective* and he now plans to serve new notices of levy on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies.

It also appears from the post-remand proceedings before the district court on November 12, 1974,[15] that the IRS, in all likelihood, *never gave notice and demand of the assessment as required by the statute.* Thus, the affidavit relied upon by the IRS to show the statutory notice was mailed asserts that "copies of Department of Treasury Forms 17-A . . . were mailed to Samuel Shapiro on December 6, 1973." See Seufert Aff., Appendix B, pp. 10a-11a, *infra.* But, as respondent pointed out to the district court on November 12, 1974 (see Transcript, pp. 23-24), the very Form 17-A attached to the Seufert Affidavit – and asserted therein to have been sent to Mr. Shapiro in compliance with the statutory notice requirements – on its face appears to be the copy the taxpayer was supposed to receive. See Appendix B, p. 12a, *infra.* And Mr. Shapiro never

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[15] The Transcript of proceedings held on November 12, 1974, was lodged with the Clerk of this Court by the government. See Govt. Br. 10, n. 7.

received the notice of assessment the IRS claims was mailed. November 12, 1974 Transcript, pp. 19, 23.[16]

For these reasons, a full hearing before the district court would establish, we believe, that (1) the assessment was invalid for failure to issue a notice and demand; (2) the lien was invalid for failure to establish a refusal to pay after demand; and (3) the levy was invalid for failure to provide prior notice and demand. The district court erred, we submit, when it assumed that levies filed on October 11, 1974, made the challenge "moot." Since there was neither a valid prior assessment nor a valid prior lien, the new levies in October 1974 cured nothing.

The law is clear that if the IRS seizes assets without complying with the notice-and-demand requirement, the seizure exceeds the lawful authority granted to the IRS and equity jurisdiction exists to invalidate any assessments and levies. See *Steiner v. Nelson*, 259 F.2d 853, 858 (7th Cir. 1958); *Bauer v. Foley*, 404 F.2d 1215, 1220-1221 (2d Cir. 1968), *modified on rehearing*, 408 F.2d 1331, 1333 (2d Cir. 1969); *Mrizek v. Long*, *supra*, 187 F. Supp. 830, 837-38 (N.D. Ill., 1959); *cf. United States v. Bonaguro*, 294 F. Supp. 750, 754 (E.D.N.Y. 1968).

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16 The IRS sought to explain the fact that the attachment to the Seufert Affidavit on its face appears to be the copy of the assessment notice supposedly mailed to Mr. Shapiro on the theory that the attachment itself might not be the actual copy of the Form 17-A notice but rather a computer printout from a magnetic tape, there possibly being no actual physical copy of what was allegedly mailed to Mr. Shapiro. See November 12, 1974, Transcript pp. 24-26. That theory fell a little flat when counsel for Mr. Shapiro pointed out that the Xerox of the attachment itself had a "jagged, torn edge" indicating that (a) this was not a magnetic tape printout and (b) was probably the actual copy of the Form 17-A the IRS claims it mailed to Mr. Shapiro on December 6, 1973 (which Mr. Shapiro never got). See November 12, 1974, Transcript p. 27.

That construction of the applicable statutory provisions comports with the express language of the Tax Injunction Act. Moreover, it comports with the two policies said by this Court in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962) to underlie the Tax Injunction Act. Thus, requiring the IRS to obey the express Congressional mandates for notice and demand cannot be said to interfere significantly with a Congressional purpose to ensure prompt collection of the revenues. Nor can such a requirement "unduly interfere with a collateral objective of the Act – protection of the collector from litigation pending a suit for refund." 370 U.S. at 7-8. In virtually every case of a good-faith revenue collection effort the Commissioner will obey the minimal notice requirements of the Act. And where the issue is in dispute, judicial determination of the facts does not require a ruling on the merits of the underlying tax liability. Finally, the notice issue itself is relatively simple and – assuming minimally competent record-keeping by the IRS – susceptible of speedy judicial resolution. Compare *Bauer v. Foley*, 404 F.2d 1215 (2d Cir. 1968), *modified on rehearing*, 408 F.2d 1331 (2d Cir. 1969), with *Trent v. United States*, 442 F.2d 405, 406 (6th Cir. 1971).

A ruling depriving the district court of jurisdiction to invalidate assessments and levies made with no notice whatsoever to the taxpayer would utterly obliterate the express Congressional directive to the IRS requiring notice of the claim before firing the "atomic cannon" of Section 6861 at a taxpayer. Thus, absent equitable intervention, the taxpayer would be left totally without a remedy against IRS action in defiance of the explicit notice requirements of the Code. In according the IRS the extraordinary and potentially devastating powers of summary seizure of a taxpayers' assets without prior hearing in any forum, Congress has at least conditioned the exercise of *both* the power of assessment and the power of levy on notice and demand for payment. In *Clark v. Campbell*, 501 F.

2d 108, 122-23 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3350 (U.S. Dec. 9, 1974) (No. 74-722), the Court of Appeals detailed the "atomic potentialities" (501 F.2d at 110) of this "awesome" weapon in the IRS arsenal. It noted (501 F.2d at 123):

> We ought not to lightly disregard the apparent Congressional intention to temper the effects of this potentially devastating summary power.

Similarly here – where the Congressional intent to temper the IRS' use of this devastating weapon with minimal notice requirements is explicit – the Court should not construe another statute as prohibiting the federal judiciary from at least confining the IRS to the minimal procedures Congress did choose to provide to ensure taxpayers an opportunity to be heard by the IRS and to undertake voluntary compliance before seizure of their assets and destruction of their financial relations with creditors. Without such protection, serious constitutional issues are presented. See *Mrizek v. Long, supra*, 187 F. Supp. 830 (N.D. Ill. 1959);[17] *Rambo v. United States*, 492 F.2d 1060, 1064-65 (6th Cir. 1974), *petition for cert. filed*, 43

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[17] The court in *Mrizek v. Long* stated (187 F. Supp. at 835):

> The Court holds that if plaintiffs are being thus deprived of their property by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment.

U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005);[18] *Schreck v. United States*, 301 F. Supp. 1265, 1281 (D. Md. 1969), *reaffirmed on reconsideration*, 375 F. Supp. 742 (D. Md. 1973), *appeal docketed*, No. 74-1566, 4th Cir. May 16, 1974.

B. The IRS actions are unlawful because they were not part of a good-faith effort to collect revenue.

The verified complaint which instituted this proceeding alleged that the IRS agents involved in Mr. Shapiro's case knew long before their assessment of his impending extradition and of the fact that the funds seized on December 6, 1973, were "being utilized . . . as security for his appearances in the administrative and judicial proceedings in the United States" (App. 12). The complaint also alleged that the agents could have inquired of Mr. Shapiro, while these funds were on deposit as security, regarding his alleged tax liabilities (App. 14). The complaint concluded *(Id.)*:

> 29. It is plaintiff's belief that the delay in instituting any inquiry whatever with respect to plaintiff's taxes was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto.

This allegation was borne out through the district court's inquiries into IRS activity which are discussed below.

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[18] In *Rambo v. United States* (492 F.2d at 1065), the court stated:

> A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law.

1. *Timing of the assessment* – The circumstances of the seizure were such that doubts as to the IRS' good faith must necessarily arise. The jeopardy assessment itself was so timed that the plaintiff might have been extradited without even knowing before his surrender that the IRS had seized his funds. As matters turned out, he was given the courtesy of a telephone call from one – and only one – bank on the day the levies were made, and this is how he learned that his assets had been taken. The copies of the notices of levy, which on their face falsely assert that "demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay" (*e.g.*, App. 22) (compare 26 U.S.C. § 6331(a)), were not, as one might expect, sent to Mr. Shapiro by mail. The Internal Revenue Service held them and did not give them up until Mr. Shapiro's counsel met with them on the afternoon of Monday, December 10, 1973. See Letter of Nathan Lewin, to Victor F. Godfrey, p. 1, Exhibit IV to Verified Complaint, Appendix D, pp. 24a-29a, *infra*.

The absence of notice and demand to Mr. Shapiro – which we have previously discussed – adds to the doubts regarding the IRS' good faith. Indeed, the court below made that observation in footnote 12 of its opinion (499 F.2d at 532 n. 12):

> Certainly, such a failure [to provide notice] would vitiate much of the good faith presumption accorded the IRS in these matters.

It is ironic that the government now contends in this Court that the Commissioner believed jeopardy existed because of Mr. Shapiro's "scheduled departure from the United States" (Govt. Br. 18, n. 11). The IRS admitted, in response to interrogatories, that a criminal investigation was underway no later

than September 24, 1973 (App. 128-130).[19] Knowing that the funds were then tied up and could not be removed from the country, the IRS failed to inquire directly of Mr. Shapiro or request access to his books and records. Instead, the special agent interviewed – of all people – an Immigration and Naturalization Service officer and the Colonel attached to the Israeli Embassy who was to be the man accompanying Mr.

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[19] The IRS asserts, relying on its answers to plaintiffs' interrogatories, that the income tax investigation of Mr. Shapiro commenced on September 24, 1973. Govt. Br. 3. Plaintiff's first interrogatories asked "[o]n what date did the Internal Revenue Service begin an investigation or inquiry *of any kind* regarding the income tax liability of Samuel Shapiro for 1970 or 1971"? (App. 128). The response was:

> The investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972, was first assigned to a special agent for investigation on September 17, 1973. However, because of a prior commitment to be on jury duty, the agent did not actually commence any investigation until September 24, 1973.

The question asked, but not answered, is when *any* investigation was then started, not when the special agent was assigned. The, when asked if the Justice Department or the U.S. Attorney communicated with any agent of the IRS on this matter (Interrogatory Two, App. 128) the IRS refused to answer on the ground that the question is (App. 129):

> . . . too broad in that it seeks information with respect to every employee of the Department of Justice as well as every employee of the Internal Revenue Service; the information sought is irrelevant and immaterial to the matters presently before the Court; it is burdensome and harrassing and calls for interoffice communications which are privileged.

Shapiro to Israel when he would be extradited. These are peculiar earmarks of a tax investigation, and they hardly justify the claim – made at the very last minute – that there is danger that money will leave the United States with the extraditee.

The district court, during the hearing of December 13, 1973, inquired of the IRS why it waited so long to make the jeopardy assessment (App. 37-38, emphasis added):

> THE COURT: But how much is owed?
>
> MR. FUERTH: Oh, I'm sorry, Your Honor, $90, 000.00. The tax assessment was $90,000.00.
>
> THE COURT: How long has that assessment been outstanding?
>
> MR. FUERTH: That assessment was made on December the 6th.
>
> THE COURT: Of this year?
>
> MR. FUERTH: Of this year, yes.
>
> THE COURT: *Well, why did you wait so long to do it?*
>
> MR. FUERTH: *We were conducting an investigation and this was the time we felt was appropriate to make it. The law merely requires that we make an assessment within three years of the date that a return is filed unless we show fraud.*
>
> We are given three years, pursuant to the provisions of Section 6501, Title 26, to make an assessment. And, of course . . . .

Subsequently, IRS was asked in an interrogatory (App. 130):

> 6. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for the years 1970 and 1971 before the levying of the jeopardy assessment.

The government's answer was as follows:[20]

> 6. This interrogatory is objected to as calling for information which is irrelevant and immaterial to the matters presently before the Court.

When it is borne in mind that all the time the IRS was concealing its investigation, most of the very assets it summarily seized were perfectly secure because the U.S. Attorney's Office and the Immigration Service had them posted as security for their bonds, the inference on the record as a whole is that the delay in inquiring of the taxpayer and then seizing his property on the eve of extradition without notice of any kind was a deliberate delay to exploit the extradition so as to seize the property without the burden of any judicial hearing.

A final telling fact that demonstrates the government's true motive is its refusal to accede to an immediate trial on the factual issues in the Tax Court – while Mr. Shapiro was still here and able to defend himself. As we have noted, a Tax Court petition was filed within ten working days of receipt of the Notices of Deficiency. The IRS took the full 60 days authorized by the Tax Court Rules to file a responsive *one-page* pleading. Thereafter, on April 11, 1974, Mr. Shapiro's counsel filed in the Tax Court a Motion for Expedited Trial, in which it was

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[20] Note that the government did not plead privilege to the inquiry. Only the timing of the government's extraordinary answer to this interrogatory allowed the government to escape compulsion to answer. The claim of irrelevance is, we submit, patently frivolous under Fed. R. Civ. Pro. 26.

asserted that the charges of illegality were "totally without substance" and that he wished a trial to take place "while he is in the United States to assist his attorney, to confront any witnesses against him, and to be able to challenge the alleged tax liability."

At a hearing in the Tax Court on April 24, 1974, on this motion, counsel for the IRS objected to a trial in the Spring of 1974, asserting that he was not prepared to proceed before the Fall. The court thereupon set the trial for September 1974 – by which time Mr. Shapiro had been forced to depart. At present, the Tax Court proceedings are in the midst of the discovery stage, and all further action has been stayed on Mr. Shapiro's motion pending resolution of this proceeding in this Court.

The pattern of consistent delay – which results in freezing Mr. Shapiro's funds over an extended period and thereby reducing the effectiveness of counsel and the taxpayer's willingness to defend himself – was reflected in the use of maximum time in bringing the case here. More than two months after the Court of Appeals' decision, the government's petition for rehearing was denied. No petition for certiorari was filed until 150 days thereafter – the longest time authorized by statute.

Judge Richey, on the bare record before him, was able to perceive a government purpose in delaying disclosure. He said, "[T]he Government was aware from the time this suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish. For the like of me, I cannot understand why that was not made known, although perhaps the government was under no obligation to do so" (App. 154). After noting again that "the government would preferably have made known the basis for its claim," the judge concluded, "I really do not like the activity of the government in this case – I will tell

you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before the man's departure . . ." (App. 154-155).

2. *Affirmative concealment.* From the inception of the jeopardy assessments on December 6, 1973, the IRS actively undertook to conceal the true basis for the assessment.

First, on December 10, 1973, Mr. Shapiro's counsel met with the responsible IRS agents to ascertain the basis of the IRS claim and discuss a possible resolution of the matter. Despite repeated requests, counsel was unable to ascertain from these agents the basis for the IRS claim. See para. 23 of the verified complaint, App. 13.[21]

Second, at the initial hearing on December 13, 1973, Judge Richey specifically inquired as to the basis for the levies in this case (App. 38):

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[21] In fact, the IRS agents at this meeting on December 10, 1973, actually implied by their questioning of counsel that the tax claim was based on a net worth-type theory – *i.e.*, where did Mr. Shapiro get his living expenses and lawyer's fees for the extradition case. See Transcript of December 13, 1973, proceedings, App. 55-56.

The agents at the meeting, incidentally, included the Special Agent in charge of the investigation (verified complaint, para. 23, App. 13; IRS Response to Interrogatory 5, App. 129-30) and one of the agents who recommended the jeopardy assessment (verified complaint, para. 23, App. 13; IRS Response to Interrogatory 8, App. 130).

THE COURT: Can you tell me the basis for a levy?

MR. FUERTH: For a levy or for an assessment, sir?

THE COURT: Well, for a levy and assessment here.

MR. FUERTH: The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

THE COURT: Do you have any evidence that you can present to the Court to verify that?

MR. FUERTH: No, Your Honor, not today.

Your Honor, if I may suggest – and I am prepared to make an argument on that – I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

At the same hearing, the IRS twice implied it intended to take the full sixty days allowed it under 26 U.S.C. § 6861(b) before issuing the required Notice of Deficiency. App. 39, 45.

Third, responses to Mr. Shapiro's interrogatories served on December 17, 1973, were evasive. One asked, "the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro" (Interrogatory Nine, App. 131). When the government declined to respond prior to the hearing scheduled for December 19, 1973, Mr. Shapiro moved to shorten the allowed time (App. 79-81). Although the court ordered that the "government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide" (App. 86), the government's answer on this interrogatory was (App. 131):

> This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provision of Section 6861(b), not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information sought herein is irrelevant and immaterial to the matters presently before the Court.

Fourth, the IRS continued to imply that it would not be prepared to make disclosures until sixty days after the assessment (App. 125-126). Only when Judge Richey made it clear that he intended to rule imminently, did the IRS produce a Notice of Deficiency. The decision was to issue on December 21 at 3:00 p.m. At 12:20 p.m. on the same day, Mr. Shapiro's counsel was served with a supplement to the earlier answers to interrogatories to which were attached copies of the Notice of Deficiency for the tax years 1970 and 1971 (App. 132-136).[22] These papers were the first to suggest that "unexplained bank deposits" and "unreported taxable income . . . from

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[22] The supplemental response revealed that the Notice of Deficiency – which did "not presently exist" as of December 19, 1973, and which the IRS through counsel had repeatedly indicated *would not* go out until February 4, 1974 (the full 60 days) – had suddenly materialized and been mailed to Mr. Shapiro on December 21, 1973, after Judge Richey postponed his initial decision to that date. App. 132.

The time of service of this document on Mr. Shapiro's counsel is shown on the copy included at p. 296 of the Appendix filed in the Court of Appeals. See also December 21, 1973 Transcript, App. 140.

We point out on the statutory notice issue that the cover letter to the Notice of Deficiency asserts that "[a]ssessment of the deficiencies and additions to the tax mentioned has been made under the provisions of the internal revenue laws applicable to jeopardy assessments" (App. 133) without making any reference whatsoever to prior notice to Mr. Shapiro.

your activities as a dealer in narcotics . . ." were at issue. The only further explanation for the income figure was the assertion that Mr. Shapiro realized $381,680.00 in gross income from hashish sales during the year 1971 (App. 135-136). Thus, roughly 93% of the government's claim of right to Mr. Shapiro's property rested on a specific allegation of criminal conduct – plainly known long before – and a totally unsubstantiated claim of gross income derived from such conduct, which allegation was consciously withheld from *both* the district court *and* Mr. Shapiro's counsel in the face of repated inquiries by the court and Mr. Shapiro and a discovery order by the court. It was suddenly sprung on both the court and Mr. Shapiro literally hours before the Court's scheduled decision.

What purpose could all this concealment have had other than to prevent Mr. Shapiro from rebutting the charges and seeking to vindicate himself? Obviously, the government was hoping that Mr. Shapiro would be out of the country before it would have to make its allegation against him.

3. *General IRS practice.* In evaluating the record before this Court to determine whether a claim of bad-faith utilization of Section 6861 powers to defeat Mr. Shapiro's statutory and constitutional rights to a pre-seizure hearing on the tax claim has been adequately raised (see pp. 35-40, *supra*), consideration must also be given to matters already in the public domain regarding IRS use of jeopardy assessment powers in narcotics cases at the time this case was unfolding in the District Court.

We note initially that publicly reported cases indicate that the IRS has – where narcotics are concerned – followed a policy of utilizing its jeopardy assessment powers "not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures." *Willits v. Richardson*, 497 F.2d 240, 246 (5th Cir. 1974); *Aguilar v. United*

States, 501 F.2d 127, 130-131 (5th Cir. 1974). See also, *Rinieri v. Scanlon*, 254 F. Supp. 469, 472-73 (S.D.N.Y. 1966); *Lisner v. McCanless*, 356 F. Supp. 398, 401 n. 5 (D. Ariz. 1973); *Woods v. McKeever*, 32 Am. Fed. Tax R.2d 5967 (D. Ariz. 1973), *appeal docketed*, No. 74-1133, 9th Cir. Jan. 25, 1974.[23]

In fact, the IRS has formally instituted a narcotics project, the stated purpose of which is to "disrupt the distribution of narcotics through the enforcement of all available tax statutes . . . maximum use [is to be] . . . made of jeopardy, quick, and transferee assessments, and termination of taxable periods." Silver, *Terminating the Taxpayer's Year: How the IRS Uses It Against Narcotics Suspects*, 40 J. Taxation 110 (1974) *quoting from IRS Manual* (Supplement November 10, 1971). In a speech before the American Bar Association Tax Section at the annual A.B.A. Convention in Hawaii on August 14, 1974, IRS Commissioner Alexander stated that the IRS recently changed its policy (Appendix E, p. 43a, *infra*):[24]

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[23] In this regard, the IRS stated in response to the first Interrogatory that "[t]he investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972 *was first assigned* to a special agent for investigation on September 17, 1973" (App. 128) (emphasis added). If this answer means that the IRS investigation began with a "special agent" (see Govt. Br. 3; but see note 19, *supra*), then that investigation *was probably criminal and narcotics-related from its inception.* See *Donaldson v. United States*, 400 U.S. 517, 534-35 (1971).

[24] But – as reported in *The Wall Street Journal* of May 19, 1975, p. 24, – the Justice Department appealed to the Secretary of the Treasury Department to reverse Commissioner Alexander's professed new policy. See Appendix F, pp. 59a-63a, *infra*.

As regards our intelligence operations, the overall emphasis of our criminal enforcement activities has been shifted away from special enforcement programs such as Narcotics Traffickers and Strike Forces, and have been aimed more directly toward the taxpaying public in general. This shift in emphasis has enabled us to achieve greater occupational and geographic coverage in our criminal tax sanctions are more equitably applied – reaching the broadest possible spectrum of society within our resource limitations I believe that our revised enforcement philosophy and not only achieves this goal, but more fully meets the intent of Congress in that our resources are being used for the enforcement of tax statutes, rather than as alternative methods for the prosecution of violators of laws normally enforced by other Federal or local agencies.

The bar of the Tax Injunction Act does not prohibit a federal court from at least requiring that the IRS exercise its extraordinary revenue collection powers in good faith. Thus, in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7-8 (1962) this Court observed:

> To require more than good faith on the part of the government would unduly interfere with a collateral objective of the Act – protection of the collector from litigation pending a suit for refund.

And last term in *Bob Jones University v. Simon*, 416 U.S. 725, 740 (1974), this Court carefully reiterated the "good faith" qualification on the IRS immunity from injunction implicit on the above-quoted passage from the *Williams Packing* case (emphasis added, footnote omitted):

> The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code. *There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and without* indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to protection of the revenues. *The [Tax Injunction] Act is therefore applicable.*

In *Sherman v. Nash*, 488 F.2d 1081 (3d Cir. 1973) the taxpayer sought injunctive relief against a jeopardy assessment, alleging, *inter alia*, that the assessment was "imposed solely to harass and coerce plaintiffs for improper purposes." 488 F. 2d at 1083. The alleged "improper purposes" were that "the IRS was assisting the Justice Department in an attempt to force Mr. Sherman to appear before a grand jury investigating various criminal activites in Hudson County, New Jersey." The Third Circuit, after carefully evaluating the legislative policies behind the Tax Injunction Act, the Section 6861 jeopardy assessment power, and the Revenue Act of 1924 (see 488 F.2d at 1083-1084) held these allegations sufficient to sustain district court jurisdiction to determine if the IRS acted in good faith under Section 6861 (488 F.2d at 1084) (footnote omitted):

> Our decision today in no way deviates from this Congressional policy, for we fully concur with those courts which have concluded that Congress withheld jurisdiction from the district courts to review the sufficiency of the facts relied upon by the IRS to support a belief that jeopardy exists. *E.g.*, Transport Manufacturing & Equipment Co. v. Trainor, 382 F.2d 793 (8th Cir. 1967); United States v. Bonaguro, 294 F. Supp. 750, 753 (E.D.N.Y. 1968).

This does not mean, however, that Congress intended that by merely following the formal procedures of Section 6861, the IRS should have thereby complete license to act arbitrarily and in bad faith and for other than the purpose of preserving revenue. *See* Iannelli v. Commissioner of Internal Revenue, 487 F.2d 317 (3d Cir., filed June 29, 1973); *Bonaguro, supra.*

When the IRS has acted ostensibly under Section 6861, but in fact has used the jeopardy assessment as a device to harass a taxpayer or as a leverage to exert pressure on a taxpayer for nontax purposes, it has exceeded its statutory authority. Section 7421 does not shield such unauthorized acts from judicial review; since they are not authorized by Section 6861, they are prohibited by the general provisions of Section 6213 and are subject to the injunction authorized therein. For these reasons we conclude that the allegations in the Shermans' complaint to the effect that the only reason the IRS imposed the jeopardy assessment was to harass and coerce the plaintiffs for improper purposes are sufficient to give the district court jurisdiction under 26 U.S.C. § 6213.

The Third Circuit's conclusion is supported by the language and legislative history of the jeopardy assessment provision. The power to make such summary determinations, now embodied in Section 6861 of the Code, has its genesis in the Revenue Act of 1924, Section 274(d), 43 Stat. 297. See Govt. Br. 18 n. 11. The main purpose of the 1924 Act was to alleviate the great hardships for taxpayers created by the pre-existing summary collection powers of the IRS. The 1924 law gave a taxpayer an option to obtain review by Board of Tax Appeals

of a claim made against him *before* the IRS could lawfully assess the tax and levy on the taxpayer's property. The House Report states (H.R. Rep. No. 179, 68th Cong., 1st Sess. 7, quoted in *Flora v. United States, on rehearing,* 362 U.S. 145, 158-59 (1969)):

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he can not, in view of Section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

The effect of the 1924 Act was to prohibit assessments and levies until issuance of a Notice of Deficiency, as authorized in § 6212. Congress explicitly authorized injunctive relief to enforce this prohibition (26 U.S.C. § 6213(a)):

> Notwithstanding the provisions of Section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

And the only exception to this general rule was "[e]xcept as otherwise provided in Section 6861. . . ."

Section 6213(a) is "a keystone in a carefully articulated and quite complicated structure of tax laws." *Cf. Flora v. United States, supra,* 362 U.S. 145, 157 (1960). A salient feature of the statutory scheme is that Congress created a jeopardy assessment and summary collection power only to cover the rare instances when, in the exercise of proper revenue collection, there is real jeopardy that the funds will not be available. The primary purpose of the 1924 amendment was to accord the American taxpayer a basic and fundamental procedural right – the right to an impartial hearing on an IRS claim before assessment and collection. Where bad faith – in the sense of a purpose other than revenue collection – is alleged, and there is a *prima facie* basis for believing the allegation to be valid, it would defeat the overriding objective of the 1924 Act to bar judicial scrutiny.

Any other construction of Sections 6213(a), 6861(a) and 7421 would lead to the anomalous result that if the Commissioner wishes to avoid judicial review prior to assessment and collection, he need just invoke Section 6861. The exception would then swallow up the rule.

If, on the other hand, injunctive relief is permitted where the jeopardy assessment appears to be in "bad faith" as defined above, such a remedy would not interfere unduly with the policies described by this Court in *Williams Packing* as underlying the Tax Injunction Act. Enjoining jeopardy assessments

designed for law-enforcement purposes unrelated to revenue collection does not interfere with "the manifest purpose" of the Anti-Injunction Act – *i.e.*, "prompt collection of . . . lawful revenue". 370 U.S. at 7.

The "bad faith" line has effectively been used by this Court to mark off another area where excessive judicial interference is believed harmful. In *Dombrowski v. Pfister,* 380 U.S. 479, 490 (1965), it held that where it is alleged in a federal court that State criminal proceedings have been instituted in bad faith, without any hope of ultimate success, a district court may enjoin the State process. And in *Younger v. Harris,* 401 U.S. 37, 48-50 (1971), in which the *Dombrowski* principle was significantly narrowed and clarified, this Court's majority explained that federal courts had the authority to prevent a State prosecution "brought in bad faith."

The policy benefits of limiting judicial power are at least as important in the area of "Our Federalism" as they are in tax collection. Yet this Court has recognized in the federalism cases that no great breach of this overriding policy is caused by an exception for those instances when individuals are subjected to bad-faith excesses by persons wielding power through government posts. The same exception is justified for the Anti-Injunction Act.

We note, finally, that this is not a case of "conclusory allegations" of bad faith. See *Sherman v. Nash, supra,* 488 F.2d at 1086 (Van Dusen, J., dissenting). What the record establishes here is:

> 1) an assessment and levy which are incontestably illegal for want of statutory notice and instituted without any prior notice whatever one business day before – as the IRS knew – the taxpayer was going to be removed from the jurisdiction;

2) an assessment based on a narcotics charge, in the context of a public record which reveals an agency policy of using assessment powers as an adjunct to narcotics law enforcement even where no legitimate revenue collection purpose is evident;

3) an active effort to conceal from the taxpayer and a United States District Court the true basis of the assessment prior to the removal of the taxpayer from the jurisdiction in the face of repeated inquiries by both the Court and the taxpayer and an outstanding discovery order;

4) a constant effort to delay the public airing of the criminal charges so as to undermine the taxpayer's opportunity to meet the allegations and disprove them.

The Court of Appeals has given the taxpayer the opportunity to prove the allegations of bad faith in a district court proceeding, and the Anti-Injunction Act does not, we submit, preclude such an inquiry.

II. THE ANTI-INJUNCTION ACT IS NOT VIOLATED BY REQUIRING THE IRS TO PRODUCE SOME EVIDENCE TO SUPPORT AN ALLEGATION OF CONTINUOUS CRIMINAL ACTIVITY WHICH IS DENIED UNDER OATH BY THE TAXPAYER, WHO PRODUCES CORROBORATING EVIDENCE.

We have discussed, in the first portion of our Brief, the unusual circumstances of this case that warrant a full hearing in the district court on the validity of the IRS' actions. We turn now to a consideration of the issues which the government would like to isolate from the full factual picture, but which we believe cannot be treated as if they were presented in a vacuum.

The government's position is, essentially, that collection pursuant to a jeopardy assessment, even where based on allegations of criminality, may be treated like any other phase of the assessment-and-collection duties of the Commissioner. To the government, this case is like *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), and like *Bob Jones University v. Simon*, 416 U.S. 725 (1974), even though neither of those cases involved (1) seizure under a jeopardy assessment of all of a taxpayer's assets, (2) tax liability based on a charge of continuous criminal conduct, (3) denials under oath of the *entire factual predicate* for the tax liability, and (4) indicia of bad faith on the part of the IRS. We believe that all these are important considerations which substantially distinguish this case from *Williams Packing* and *Bob Jones*. And we believe that the consequences of the seizure for this taxpayer – albeit not as disastrous as was feared when suit was instituted – are as much "irreparable injury" as those in *Williams Packing* and *Bob Jones*, where the Court found that there was harm to the taxpayers – justifying equitable intervention absent the Anti-Injunction Act.

It is, of course, one thing to say – as *Williams Packing* and *Bob Jones* do – that the usual civil tax issue must be litigated through a refund suit or in a Tax Court proceeding except where a taxpayer is able to prove, beyond debate and without compelled disclosure of the IRS case, that "under no circumstances could the Government ultimately prevail." The procedures prescribed by the Code – recognized by this Court as not necessarily "the best that can be devised" (416 U.S. at 747) – are suitable and adequate when a taxpayer is present, has funds to pay an attorney to represent him in a civil tax proceeding, and is confronted with the usual civil claim in which he has the understandable burden, under the Code, of proving his case by a preponderance of the evidence.

The circumstances are entirely different, however, when the tax claim is made just as the taxpayer has one foot on a plane that will take him out of the United States forever, when it is accompanied with a seizure that confiscates all his assets and makes it impossible for him to retain an attorney,[25] and when it is based on an allegation the government ordinarily has the burden of proving and that a taxpayer can only refute by denying it outright – as Mr. Shapiro did. In such a factual context, we are much closer to the situation described in this Court's *Bob*

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25 Counsel representing Mr. Shapiro in this Court also represented him in the extradition proceeding and were compensated for services relating to that proceeding. Counsel advises this Court, however, that no compensation whatever has been received for services since December 6, 1973 – *i.e.*, for any legal services in this case or in the Tax Court. We have represented Mr. Shapiro out of a sense of duty to a man who has been our client and has been badly treated by government agents. Future taxpayers may not be able to find counsel so sympathetic to their plight.

Jones opinion – where "an aggrieved party has no access at all to judicial review." 416 U.S. at 746. Indeed, Mr. Shapiro sought the quickest route to judicial review. Eschewing a refund suit in the district court since it would have required exhaustion of administrative refund remedies (which would doubtless have been delayed for a full six months), he filed a Tax Court action and asked for an immediate trial. The government succeeded in deferring the trial – on grounds that counsel was unprepared – until the accused was safely beyond a place where he could confront his accusers (if any, in fact, exist), assist his counsel at trial, and take the stand in his own defense.

A careful analysis of the government's position can most fruitfully begin, we believe, with a comparison of a situation in which tax liability is based on a civil claim with one in which criminality is alleged. If *Williams Packing* and *Bob Jones* apply, as the government urges, to tax claims based on charges of criminal conduct, there is no limit to the availability of the IRS remedy against anyone suspected of crime. If a suspected bank robber or embezzler or garden-variety thief or mugger finds himself the target of a levy pursuant to a jeopardy assessment, how can he ever prove that "under no circumstances could the Government ultimately prevail" on its criminal charges? So long as the government keeps its evidence secret, he has no way whatever of meeting the charges made other than flatly to deny the allegation.

Our Constitution, as judicially construed, has erected substantial safeguards to insure that no one be convicted on criminal charges without careful procedures and objectively demonstrable proof. To sustain a conviction, evidence must be sufficient to establish a case beyond a reasonable doubt, and even to seize evidence or formally to

institute a criminal proceeding, probable cause is required. And each of these standards must be applied by a disinterested party, not by the enforcing agency. As this Court forefully observed in *United States v. United States District Court*, 407 U.S. 297, 317 (1972) (citation omitted):

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

The effect of the government's argument – if applied here – is to rule that whenever federal tax consequences may flow from criminal activity (which probably covers at least 90 percent of crime in the United States), IRS agents become "sole judges" of their right to seize the alleged proceeds of the crime.

If a prosecutor were to seek the same objective, he would be forced to produce enough evidence to satisfy a neutral and detached magistrate that there was probable cause to believe that the target of his seizure had committed the offense and that he had possession of the proceeds. But if the IRS seeks the same end, the government claims that the Anti-Injunction Act forbids the taxpayer

from requiring such a demonstration – even after the taxpayer comes forward (as he is *not* obliged to do in the usual criminal case), denies the allegation under oath and submits corroborative proof.

The public record indicates that, in dealing with suspected criminals, the IRS, operating to accommodate law enforcement authorities with goals unrelated to legitimate revenue collection, has structured its claims to justify assessments that would tie up all known assets of a narcotics or gambling target without regard to whether or not there is any foundation whatsoever for a tax claim comparable to the size of the assessment. A classic example is *Rinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y. 1966), wherein the *modus operandi* of the IRS agent was revealed in the following colloquy:

> Q. To be very blunt about it, isn't it the fact that you were just merely told to write a report that would come out with an income tax of approximately $24,500 so that the government would have a basis of seizing this money, isn't that the blunt fact?
>
> A. That would be part of it. My position is to protect the government.
>
> Q. I want an answer, yes, or no, Mr. Vita. Isn't that the blunt fact?
>
> A. Yes.

The *Rinieri* Court characterized the IRS' conduct as "arbitrary, capricious and unconscionable." 254 F. Supp. at 474. The "blunt" fact is that – where individuals are thought to be engaged in narcotics or gambling or other illegal activity – this type of thing is not uncommon.

See *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974); *Aguilar v. United States*, 501 F.2d 127 (5th Cir. 1974); *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969); *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973); *United States v. Bonaguro*, 294 F. Supp. 750 (E.D.N.Y. 1968). In fact, in the narcotics area, use of the jeopardy assessments powers to disrupt the alleged criminal endeavor *was an acknowledged IRS policy*. See Silver, *Terminating the Taxpayer's Taxable Year: How the IRS Uses It Against Narcotics Suspects*, *40 J. Taxation* 110 (1974); pp. 44-50, *supra*.

The Fifth Amendment protects a criminal accused – even in the police station (*Miranda v. Arizona*, 384 U.S. 436 (1966)) from being forced to rebut allegations that he engaged in illegal activity. Yet, a strict application of *Williams Packing* and *Bob Jones* to a situation such as this one would require a full disclosure as the only means to prevent extreme forfeitures. While we do not argue that a taxpayer such as Mr. Shapiro has no burden whatever, we believe his obligation must also be measured by Fifth Amendment standards. The government offers the following characterization of the evidence submitted by Mr. Shapiro (Govt. Br. 15, 32):

> The only evidence submitted by respondent during the first proceeding was a single affidavit which simply alleged that he was not liable for the additional amount assessed. This blanket denial of liability is insufficient to meet the *Williams Packing* test. Moreover, even after the Commissioner issued the notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, respondent still

> failed to produce any evidence to establish that the assessment was without foundation. . . .
>
> * * *
>
> Moreover, even after the Commissioner issued a notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, . . . respondent did not even come forward personally to deny the Commissioner's determination. Rather, one of his counsel merely told the district court that respondent had advised another of his counsel that the Commissioner's determination of income from narcotics dealing was false (A. 138). This twice-removed assertion does not even rise to the level of credible evidence, much less establish that the assessment was without foundation.

This characterization is totally erroneous. The affidavit filed on December 13, 1973, states, *inter alia* (App. 20):

> 2. I have been advised by my counsel that the Internal Revenue Service claims that I owe more than $92,000 in taxes for the tax years 1970 and 1971. I filed a tax return for the 1971 tax year, which was accurate and which properly reflected my income and tax obligations. I had no income whatever for 1970.
>
> * * *

> 4. I have also been advised by my counsel that the Internal Revenue Service questioned him on where I had the money to live and to pay for the services of counsel in the matter of my extradition. Before arriving in the United States, I had made successful investments in Europe and had funds at that time, part of which I brought with me and the other portions of which were brought to me after I arrived in the United States. I can establish this fact by documentation and by testimony of witnesses, and would be prepared to do so in a *bona fide* inquiry into my tax obligations.

That affidavit replied factually, intelligently and completely as the taxpayer could in the face of the IRS' conduct at that point in: (a) refusing despite repeated inquiries on December 10, 1973, to tell Mr. Shapiro the basis for the IRS claim of taxes due (App. 13); and (b) actually misleading counsel at that time into believing that the IRS was essentially going on some sort of net-worth theory based on Mr. Shapiro's living and litigating expenses during the taxable years (App. 55-56).

At this point Mr. Shapiro had not even been told the amount of income the IRS thought he had earned, much less the alleged nature of the income. Nonetheless, in addition to a "blanket denial," he under oath (a) set forth in general the source of the funds, his use of which the IRS had led his counsel to believe was the main source of their claim, and (b) made a proffer of documentation and testimony of to prove his sources. In the face of a failure on the IRS' part to offer an iota of specification of what it was claiming, that affidavit went as far as the taxpayer could intelligently go.

Moreover, when the true basis for the claim finally was revealed by the IRS on December 21, 1973, Mr. Shapiro, in his verified petition in the Tax Court (filed January 3, 1974), denied the narcotics charge under oath (App. 162).[26] At the hearing itself – held (by schedule announced to all parties the prior day) less than three hours after the government sprang the document it had maintained on December 19, 1973, was not in existence revealing the narcotics charge – Mr. Shapiro (who was then in New York City) made his denial the only way he could: *i.e.*, through his counsel's representations (App. 138). It ill behooves the IRS in this Court now to question the evidentiary sufficiency of that denial on the record as it stood before the district court on December 21, 1973, when it dismissed the complaint.

Requiring the IRS to come forward in the face of these denials with some credible evidence cannot interfere with legitimate revenue collection goals or unduly subject the collection to collateral litigation. Thus, the IRS is not being required to "prove" its claim. All it need do is show some credible evidence that (a) its target was in fact engaged in the activity in question and (b) its projections are based on some reality.

For these reasons, the circuit courts have consistently recognized that the IRS may be expected to make a showing of some credible foundation for its charge and its

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[26] The Tax Court Petition was produced as part of the record before the court of appeals (CA App. 308-16), and relied on by Mr. Shapiro in that Court. See Br. for Appellants in No. 73-2260, p. 22 n. 13.

projections.[27] Indeed, insofar as *Lucia* and *Pizzarello* involve wagering taxes – where there is no general right under Section 6213(a) to judicial review prior to payment

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[27] In *Hamilton v. United States*, 309 F. Supp. 468 (S.D.N.Y. 1969) – cited by the Government in its Brief at 30 n. 20 – the Court sustained the income extrapolation because – unlike *Pizzarello* (and the instant case) the record "reveals an independent evidentiary basis for the Government's determination that plaintiff was in the wagering business from July 1961 to May 1965." 309 F. Supp. at 473. Moreover, the Court noted that "[r]esort to [the IRS extrapolation] here became necessary only because plaintiff failed to maintain and furnish the daily records required to be kept by 26 U.S.C. §4403 (see n. 4)." 309 F. Supp. at 473. Finally, the record showed four taxpayer convictions over an eight-year period on gambling charges. 309 F. Supp. at 470 n. 5a.

In affirming the *Hamilton* case, the Second Circuit made certain that the Government would not be able to infer an intention to back away from *Pizzarello*. See *Hamilton v. United States*, 429 F.2d 427 (2d Cir. 1970), *cert. denied*, 401 U.S. 913 (1971):

> We affirm for the reasons stated in Judge Mansfield's opinion, 309 F. Supp. 468 (S.D.N.Y. 1969) which, among other things, pointed out that the facts differ in important respects from those which we consider dispositive in Pizzarello v. United States, 408 F.2d 579 (1969), cert. den. 396 U.S. 986. . . .

In *James v. United States*, 510 F.2d 860, 861 (6th Cir. 1975) – cited at Govt. Br. 29 n. 19 – the Sixth Circuit *did not adopt* the apparent District Court assertion that *Lucia* and *Pizzarello* "carved out further exceptions" to the Tax Injunction Statute. Rather, it put its affirmance on *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), and *Trent v. United States*, 442 F.2d 405 (6th Cir. 1971). In *Cole v. Cardoza*, 441 F.2d 1337, 1342, the Court – in rejecting the strictly conclusory allegations of the complaint, noted:

> The difference in amount between that charged in the indictment and that assessed for civil liability is not enough to indicate that the Government cannot

(cont'd)

of the tax, see *Trent v. United States*, 442 F.2d 405, 406 (6th Cir. 1971) – there is even more justification here than there was there for requiring the IRS to come forward with its basis.

The government erroneously contends in its brief in this Court that the effect of the court of appeals' decision is "invert[ing] the burden of proof applicable in tax cases" (Govt. Br. 27) by requiring the Commissioner to "prove . . . the facts upon which a tax assessment is based" (Govt. Br. 2). The government is doubly wrong. To be sure, there is a presumption of validity to the usual Notice of Deficiency issued by the IRS, and a taxpayer ordinarily has the burden of proving that an assessment is erroneous. But that presumption does not apply, by Congressional directive in Section 7454(a) of the Internal Revenue Code, in "any proceeding involving the issue whether the [taxpayer] has been guilty of fraud with intent to evade tax."

Tax liability based on illicit conduct necessarily carries with it an allegation of fraud with intent to evade tax – whether or not fraud is expressly alleged. Consequently, the proper party on whom the burden of proof should rest where illegality is charged is the Commissioner. By

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(Footnote 27 cont'd)

> under any circumstances prevail. In this regard, we note that appellants failed to deny that Mr. Cole was in fact engaged in wagering or that he was liable for the $14,744.58 assessed or any part thereof. . . .

In *Trent v. United States*, the opinion does not reveal if the mode of projection was challenged but indicates only that the taxpayers "assert that they were not in the wagering business at all. . . ." 442 F.2d at 406.

entering a jeopardy assessment and then calling on the taxpayer to establish his innocence of the allegation, the Commissioner is the one who is "inverting" the burden of proof.

Moreover, on the government's premise that the taxpayer retains the burden of proving nonliability even where criminality is alleged, the decision below did *not* require the Commissioner to "prove" anything in the usual sense of the word. A careful reading of paragraphs numbered 4 and 5 in Section III of the court's opinion (Pet. App. 13A-16A) and of the remand instructions appearing in Section IV (Pet. App. 16A-17A) will demonstrate that a minimal burden is imposed on the government.

Initially, it should be noted that the court emphasized and quoted from both *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (*en banc*), and *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969), in both of which *it was undisputed that the taxpayer had engaged in at least one illegal transaction.* The only question in both *Lucia* and *Pizzarello* was whether the illicit activity – acceptance of wagers – had continued over the period of time that the IRS claimed.[28] In the present case, the taxpayer disputes, under oath, ever

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[28] This Court can, we believe, take judicial notice that it is far more probable that one who has operated a bookmaker over a period of three days (as did Pizzarello) has engaged in the same activity over the full tax year than that one who has transferred narcotics (as Mr. Shapiro is alleged to have done) or one, two, three or half a dozen occasions had done so over a full tax year. Operating a bookmaking establishment is more likely to be a regular occupation than the sporadic transfer of narcotics.

having sold narcotics. Hence, the Commissioner's obligation to provide some rational factual support for its summary seizure should be heavier in this case than in *Lucia* or *Pizzarello* since neither illegality nor the mathematical projection by which the total liability is derived is conceded.

The text and footnote 27 of the court's opinion plainly indicate that the court below read both *Pizzarello* and *Lucia* as requiring that the government "prove" only that its deficiency was not "arbitrary and plainly excessive." In explaining its ruling in light of the Second and Fifth Circuit cases, the court concluded (Pet. App. 16A):

> [A]t the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be "an exaction in the guise of a tax." . . . The District Court should therefore inquire whether there are any facts from which good faith may be inferred, and absent such facts, the judge should not dismiss the case in deference to any presumption in favor of the IRS.

Although we believe that, at the very least, a "probable cause" standard should apply in these circumstances, the court below did not even set so minimal a threshold. By describing the test as whether the asserted deficiency was "arbitrary and excessive" and whether "there are any facts from which good faith may be inferred," the court of appeals apparently permitted the government to sustain its

seizure with less than what is required for a seizure of evidence or for a formal charge.[29]

Apparently, in order to demonstrate that too severe a burden is being imposed on the Commissioner, the government has submitted for this Court's examination the record on remand after the decision which was the subject of the petition for certiorari. Assuming *arguendo* that the record may be considered here, we believe that it refutes the argument made at pages 33-35 of the government's brief.

There are, as we have previously noted, two discrete premises underlying government's claim:

First, that Mr. Shapiro sold hashish.

Second, that he did so on a regular basis throughout the tax year, thereby incurring the claimed tax liability. The affidavit upon which the Commissioner relied for his "factual submission" did not meet the most minimal standard of proof on the second of these propositions and failed to meet the established "probable cause" standard on the first.

With regard to Mr. Shapiro's alleged dealings in hashish, the total basis for the revenue agent's conclusion was:

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[29] Judge Richey said on remand (Transcript of November 12, 1974, p. 11):

> The burden is on the government to show that the claim is not entirely excessive, arbitrary, capricious, and without factual foundation.

> (a) "*information supplied* to the Internal Revenue Service [which] *indicated*" that Mr. Shapiro had engaged in such activity, and
>
> (b) "money transfers from an individual since convicted of selling hashish, who stated that the transfers were for hashish supplied to him by Samuel Shapiro"

See Govt. Br., 10 n. 7 (Conde Aff.).

Does the assertion included in paragraph (a) above suffice to meet a claim of arbitrariness? Given the anonymity and generality of the information "supplied" and the fact that it only "indicated" the factual conclusion, we submit that it is not enough – even under the court of appeals' looser test – to meet the assertion that the assessment was made in bad faith. Subparagraph (b) adds, however, at least one specific informant – whose reliability is unknown and whose identity is totally concealed. A court might possibly consider both paragraphs together and say that this is enough – albeit barely – to warrant the requisite inference that the accusation that Mr. Shapiro dealt in hashish was made in good faith and was not totally arbitrary.

Plainly, however, the two paragraphs do not add up to probable cause. The first is, in substance, precisely what was held hopelessly insufficient in *Aguilar v. Texas,* 378 U.S. 108 (1964), which this Court again reaffirmed in *United States v. Harris,* 403 U.S. 573, 578 (1971), where it viewed as constitutionally inadequate any affidavit which is a "mere affirmation of suspicion and belief." The second paragraph fails because there is neither any way of knowing through how many levels of hearsay the information has filtered (the revenue agent did not swear that he

had spoken to the informant nor did he indicate how the information had come to him) and there is absolutely no basis – much less any "substantial basis" (as required by *Harris* and by *Jones v. United States*, 362 U.S. 257 (1960)), to credit the hearsay. Indeed, the anonymous informant's narcotics conviction is reason for *disbelieving* his testimony about others, not reason for crediting it.

Fatal to the government's contention, however, is the total absence of any basis for the revenue agent's projection of full-year profits. Surely, if the government chooses to proceed against suspected narcotics violators by seizing their assets for nonpayment of taxes rather than by criminal prosecution for narcotics violations,[30] the government should not be permitted to avoid the proof that goes with a tax case. Even if the six payments were for transfers of hashish, there is no basis whatever for assuming that such payments were made at any other time during the year. Nor should guess, speculation and surmise based on "known practice in hashish trafficking" and on "common practice in hashish dealing" be permitted as a substitute for valid evidence here than it would be in any lawful business. May an annual income be similarly projected for an individual who has sold six automobiles – without a scintilla of proof that he operates a car dealership?

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30 At the hearing of December 21, 1974 – less than three hours after the narcotics allegation was first made known by delivery of the Notice of Deficiency – one of Mr. Shapiro's attorneys – formerly an Assistant Attorney General in charge of the Criminal Division – noted in open court that if the allegation was true, federal criminal charges should be brought. It is now 20 months later, and no such charges have been filed.

Would it be permissible for the IRS to assess an architect – assuming he is regularly in the business – on a similar "projection" of six contracts? We believe that any court would find such an assessment both arbitrary and excessive. It is more – and not less – so when the allegation is that the taxpayer's conduct has been criminal.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N. W. – Suite 500
Washington, D. C. 20037
(202) 293-6400

Attorneys for the Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO and BELLA SHAPIRO, *Plaintiffs,*	:	
v.	:	**Civil Action No. 2172-73**
SECRETARY OF STATE, *et al.*, *Defendants.*	:	

[Filed May 30, 1974]

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, plaintiffs hereby move for the entry of summary judgment in their favor in this action on the ground that there is no dispute as to the fact that plaintiff Samuel Shapiro was given no notice whatever before the "Notices of Levy" were served on his New York banks and before a lien was filed in the county where he and his wife own a home.

As grounds for the entry of the judgment requested, plaintiffs rely upon the opinion of the Court of Appeals for the District of Columbia Circuit remanding this case to this Court, particularly on footnote 12 at pages 6-7 of the said opinion. Plaintiffs also rely on paragraph 18 of the verified complaint herein, wherein the plaintiff Samuel Shapiro stated under oath that "without any prior notice or warning whatever" the "Notices of Levy" were filed upon banks in New York and plaintiffs' assets were seized. Pursuant to Rule 1-9(g) of the Rules of the United States District Court for

the District of Columbia, plaintiffs are submitting together with this motion a statement of the one material fact relevant to this motion as to which there is no genuine issue – *i.e.*, that there was no notice whatever given to Samuel Shapiro before the "Notices of Levy" were served on the banks.

WHEREFORE, plaintiffs respectfully request that this Court enter summary judgment for the plaintiffs and issue a permanent injunction against the peremptory seizure of plaintiffs' assets caused by the issuance of the "Notices of Levy" and the jeopardy assessment made in this case.

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

MILLER, CASSIDY, LARROCA
& LEWIN
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Suite 500
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed May 30, 1974]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On May 15, 1974, the Court of Appeals remanded this case to the District Court for further proceedings in which a record might be developed to support a ruling on the complaint and any motions filed herein. It is the plaintiffs' view that the full discovery which was not had prior to this Court's ruling on the defendants' motion to dismiss would result in a factual record that would require the entry of judgment for the plaintiffs. It is not, however, necessary to engage in this full discovery procedure since, under the ruling of the Court of Appeals, there is a much more clear-cut and simple ground for the entry of judgment in favor of the plaintiffs.

At pages 6-7 of the Court of Appeals' slip opinion (a copy of which is attached hereto for the convenience of the Court), the Court of Appeals noted that any levy pursuant to a jeopardy assessment must follow "prior notice of the demand for payment." The Court of Appeals stated, in footnote 12 of this opinion, as follows:

> The power to levy is inoperative until the subsequent "failure or refusal" of the taxpayer to pay the required amount. In the present case there are allegations that the Commissioner failed to provide the taxpayer the required notice prior to serving "Notices of Levy" on the taxpayer's New York banks. If so, then the Commissioner may well have violated Shapiro's right to due

process. *See, e.g., Mrizek v. Long,* 187 F. Supp. 830, 835 (N.D. Ill., 1959):

> . . . If plaintiffs are being thus deprived of their property by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment.

If proven, this alleged failure by the IRS to adhere to the statute might well be sufficient basis for an injunction against the levies, assuming the presence of the other essentials of equitable jurisdiction. Certainly, such a failure would vitiate much of the good faith presumption accorded the IRS in these matters. *See* text, *infra,* at note 30. But absent an express finding of fact by the District Court, we are reluctant to lend dispositive weight to the untested allegations in appellant's brief.

The verified complaint filed in this case alleged that there was no notice whatever to the taxpayer from the Internal Revenue Service before the time that the levies were served. Indeed, the defendants have never contended otherwise, and it is clear from the entire course of conduct from and after December 6, 1973, that the service of these notices was a total surprise to the plaintiffs.

This failure by IRS invalidates totally the notices served on December 6, 1973, and requires the release of all funds and an injunction against the issuance of any levies or jeopardy assessments. Together with this motion, we have filed a Statement of Material Facts As To Which There Is No Genuine Issue, in which we assert that the absence of notice

is uncontested. The IRS's failure to serve such notice constitutes a violation of the taxpayer's Fifth Amendment rights and requires the entry of an injunction in this case.

Respectfully submitted,

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

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(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(g) of the Rules of the United States District Court for the District of Columbia, plaintiffs hereby assert the following material fact as to which there is no genuine issue:

1. Samuel Shapiro was given no notice by the Internal Revenue Service or any agent thereof of any claimed tax liability prior to the time that "Notices of Levy" were served on his New York banks and others who had custody of his funds on December 6, 1973.

Respectfully submitted,

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

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(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed May 30, 1974]

CERTIFICATE OF SERVICE

I, Nathan Lewin, hereby certify that on May 29, 1974, I caused to be mailed to Robert T. Rankin, Esq., Office of the United States Attorney, United States Courthouse, John Marshall Plaza, Washington, D.C. 20001, by first-class mail, prepaid postage, a copy of the plaintiffs' Motion for Summary Judgment, Statement of Material Facts as to Which There is No Genuine Issue, Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Proposed Order.

/s/ NATHAN LEWIN
Nathan Lewin

Attorney for Plaintiffs

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Received October 11, 1974]

RESPONSE TO THE MOTION FOR
SUMMARY JUDGMENT FILED BY THE PLAINTIFFS

Now comes the Commissioner of the Internal Revenue Service, by his attorneys, and responds to the plaintiffs' Motion for Summary Judgment as follows.

As can be seen from the affidavit attached hereto as Exhibit A, notice of and demand for payment of the jeopardy assessments was made on December 6, 1973. The records of the Internal Revenue Service apparently do not reflect at precisely what time the notices and demand for payment of the jeopardy assessments were placed into the United States mails. Thus, although the notices and demand were given on the same date as the assessments were made and the levies served, all within a few hours of each event, we are unable to ascertain whether the notices and demand were given before, contemporaneously with, or after the service of the levies. Accordingly, the Commissioner of the Internal Revenue Service is now willing to concede that the levies served on December 6, 1973, were defective and he now plans to serve new notices of levies on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies.

Insofar as the Motion for Summary Judgment seeks to recover any funds already collected pursuant to levies that were honored heretofore, any relief with respect to lifting the levies is moot and any relief with respect to releasing

any liens or the return of any such funds is premature until either the Tax Court of the United States determines that no deficiency exists or this Court makes the necessary factual finding in accordance with the mandate of the Court of Appeals that no factual foundations for the Commissioner's actions making the jeopardy assessment existed and an action seeking the refund of taxes paid is properly filed pursuant to Section 7422 of Title 26 U.S.C.

/s/ JOHN J. McCARTHY
John J. McCarthy, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ STEPHEN G. FUERTH
Steven G. Fuerth
Assistant Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Of Counsel:

EARL J. SILBERT
United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO and BELLA SHAPIRO,
Plaintiffs,

v.

SECRETARY OF STATE, *et al.*,
Defendants.

Civil Action No. 2172-73

AFFIDAVIT

STATE OF NEW YORK :
COUNTY OF SUFFOLK: SS:

HENRY P. SEUFERT, being duly sworn, deposes and says:

1. He is the Director, Brookhaven Service Center, Holtsville, New York, and has served in that capacity since his appointment by the Commissioner of Internal Revenue on August 5, 1973, and as said Director, he is responsible for the assessment of all federal taxes within the Region covered by the said Service Center.

2. He certifies that he has caused a search to be made of the records of the Director, Brookhaven Service Center, Holtsville, New York, and that the official records of his office show that jeopardy assessments for individual income taxes for the calendar years 1970 and 1971 were made against Samuel Shapiro, 208 Maple Avenue, Monsey, New York on December 6, 1973 and in amounts as more fully set forth as follows:

Taxable Period	AMOUNT OF ASSESSMENT Tax	Penalties	Interest	Assessed Balance
1970	$ 5,137.89	$1,705.79	$ 814.11	$ 7,657.79
1971	79,368.50	3,968.48	7,774.85	91,111.83

3. That the official records of the Director, Brookhaven Service Center, Holtsville, New York, show that on December 6, 1973, Department of Treasury Forms 17-A were mailed to Samuel Shapiro giving him Notice of and making demand for payment of said jeopardy assessments.

4. Attached to and hereby made a part of this affidavit are copies of Department of Treasury Forms 17-A which were mailed to Samuel Shapiro on December 6, 1973.

/s/ HENRY P. SEUFERT
Henry P. Seufert
Director, Brookhaven
Service Center

Subscribed and sworn to before me this 28th day of August, 1974.

/s/ JAMES T. ANDERSON
Notary Public
James T. Anderson
Notary Public, State of New York
No. 52-4515 32
Qualified in Suffolk County
Commission Expires March 30, 1975

- - - - - - - - - - - - - -

Department of the Treasury
Internal Revenue Service
Form 17-A

132-32-8801
SAMUEL SHAPIRO
208 MAPLE AVE
MONSEY NY 10952

JEOPARDY

50

23C 12 06 73
7012
1040
IRC 6861

FOR IRS INFORMATION ONLY

13647-340-20000-73
Document Locator Number

Reference and date	Assessment*	Amount paid	Balance due
12-06-73	5,137.09		
0 PEN.	1,264.47		
I: JEN	256.90		
R INT	214.11		
JEO	134.42		

Statement of Tax Due IRS

This Copy Is For Your Records

* "P" means penalty
"I" means interest

This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" within 10 days from the date of this notice.

If you need to contact us about your account, please include the Document Locator Number (shown in the address block above) in your letter.

TY 26 (REV. 8-70) PART 3

Thank you for your cooperation

Date of this notice

12a

Department of the Treasury
Internal Revenue Service
Form 17-A

132-32-8801
SAMUEL SHAPIRO
208 MAPLE AVE
MONSEY NY 10952

JEOPARDY

50

23C 12 06 73
7112
1040
IRC 6861

FOR IRS INFORMATION ONLY

13647-340-20001-73
Document Locator Number

Reference and date	Assessment*	Amount paid	Balance due
12-06-73	79,363.50		
0 PEN	3,968.48		
R INT	7,774.85		
			91,111.83

Statement of Tax Due IRS

This Copy Is For Your Records

* "P" means penalty
"I" means interest

This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" within 10 days from the date of this notice.

If you need to contact us about your account, please include the Document Locator Number (shown in the address block above) in your letter.

TY 26 (REV. 8-70) PART 3

Thank you for your cooperation

Date of this notice

13a

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

* * * * *

MEMORANDUM OF LAW IN SUPPORT OF
THE RESPONSE TO THE MOTION FOR
SUMMARY JUDGMENT FILED BY THE PLAINTIFFS

This is an action wherein the plaintiff sought to enjoin the United States from executing a certain warrant for the extradition of the plaintiff Samuel Shapiro, or in the alternative, to cause the defendant, the Commissioner of Internal Revenue, to lift certain notices of levy which were served to collect a jeopardy tax assessment made on December 6, 1973. The Government filed a motion to dismiss the plaintiffs' complaint and on December 21, 1973, this Court entered its order dismissing the action. On December 26, 1973, the plaintiff filed a notice of appeal with respect to the order of dismissal appealing this action to the United States Court of Appeals for the District of Columbia Circuit.

On May 15, 1973, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part the decision of this Court and remanded the case to this Court for further proceedings so as to allow the District Court an opportunity to develop a record that adequately supports the ruling on the Government's motion to dismiss with respect to the tax aspects of this case. Thereafter, on May 29, 1974, the Commissioner of Internal Revenue, filed a petition for rehearing with the United States Court of Appeals for the District of Columbia Circuit. On or about May 29, 1974, the plaintiffs also filed a Motion for Summary Judgment in the District Court. The defendant then filed a Motion to Strike the Motion for Summary Judgment or in the alternative to Stay All Further Proceedings with Respect

to Plaintiffs' Motion for Summary Judgment. On July 3, 1974, this Court entered an Order staying the requirement that the defendant respond to the Motion for Summary Judgment pending the District Court's receipt of the mandate of the United States Court of Appeals for the District of Columbia. On July 17, 1974, the Motion for Rehearing before the Court of Appeals was denied. The Commissioner now responds to the Motion for Summary Judgment as required by the Order of this Court entered on September 19, 1974, and submits this memorandum of law in support thereof.

FACTS

On December 6, 1973, jeopardy assessments for the years 1970 and 1971 were made against the plaintiff Samuel Shapiro and notices and demand for the payment of said jeopardy assessments were mailed on the same date. (See affidavit attached as Exhibit A to Response to Plaintiffs' Motion for Summary Judgment.) Also on December 6, 1973, notices of levy were served on a number of institutions. (See Exhibits A, B, C, D and E to plaintiffs' Complaint.) The records of the Internal Revenue Service apparently do not disclose at precisely what time the notices and demand for payment of the jeopardy assessments were placed in the United States mails. However, since the notices of levy were served at varying times between 1:15 p.m. and 2:40 p.m. on December 6, 1973 (see Exhibits A through E attached to plaintiffs' Complaint), it is clear that the notices and demand were mailed within a few hours of the service of the notices of levy and could have been mailed prior to, contemporaneously with, or shortly after the making of the assessments. Additionally, while not now in the record before this Court, notices of liens pursuant to the provisions of Section 6323 of Title 26 U.S.C. were properly filed with the appropriate recording official in the State of New York.

Since the date the levies were served some of the levies were honored. Specifically, the Court is advised that the levy served upon the Nanuet National Bank and Fred Topper were honored on June 14 and June 4, 1974, respectively, and $10,854.73 was received pursuant to that levy. The levy served upon the Dime Savings Bank was partially honored and the proceeds of a joint checking account in the amount of $1,172.84 was received. A safety deposit box at the Empire National Bank was opened pursuant to a levy served upon the bank on December 13, 1973, by the plaintiff Bella Shapiro, the contents therein were inventoried and were released with the exception of $250 in United States Savings Bonds and a man's watch. There remains unhonored levies served upon the Chemical Bank, the Dime Savings Bank, the First National City Bank,[1] the Empire National Bank, and the National Agency Managers, Inc. Plaintiffs have now filed a Motion for Summary Judgment seeking to have the Commissioner withdraw all notices of levy and all other documents filed anywhere in the United States which purport to seize, attach, or otherwise claim any interest in the property of Samuel Shapiro or his wife Bella Shapiro, and that the Commissioner of Internal Revenue release all funds now held by him and by the Internal Revenue Service pursuant to the notices of levy issued on December 6, 1973.

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[1] This levy was served on December 7, 1973.

ARGUMENT

I

THE NOTICES OF LEVY SERVED ON DECEMBER 6, 1973, MAY BE TECHNICALLY DEFECTIVE

As is pointed out above, on December 6, 1973, jeopardy assessments were made against the plaintiff Samuel Shapiro pursuant to the provisions of Section 6861 of Title 26 U.S.C. As can be seen from Exhibit A attached to the Commissioner's response, notice and demand for the payment of these assessments was also made on December 6, 1973.

The only question now before the Court is whether notices and demand preceded the service of the notices of levy and, if not, whether the failure to give prior notices and demand constituted the denial of due process. (See footnote 12 of the Court of Appeals decision.) As is pointed out above, it is clear that the assessments, the notices and demand, and the service of the notices of levy were made in the space of a few hours and the notices and demand may well have preceded the notices of levy or may have been made contemporaneously therewith. In view of this technical defect in the making of the levies, the Commissioner of Internal Revenue now concedes that such levies are technically defective and he now plans to serve new notices of levies on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies. However, it should be noted that any defect in the service of levies does not in any way invalidate the assessments, but merely affects the enforceability of the levy. The assessments involved herein clearly were made in a procedurally correct manner. As noted prior hereto, the assessments were made on December 6, 1973.

When jeopardy assessments are made as is the case here, Section 6861(b) of Title 26 U.S.C. requires that the Commissioner mail within 60 days to the taxpayer a statutory notice of deficiency which entitles a taxpayer to petition the United States Tax Court for a redetermination of such deficiency and assessment. In the present case this notice was mailed to the taxpayer on December 21, 1973 (see the Supplemental Response to Plaintiffs' Interrogatories filed December 21, 1973), which was within 15 days of the making of the assessment.[2] Further, the notices and demand for payment with respect to the making of such assessments were properly and timely given within the 60-day period set forth in Section 6303 of Title 26 U.S.C., since the notices and demand were mailed on the same date that the assessments were made.

The right to serve notices of levies set forth by Sections 6331, *et seq.*, of Title 26 U.S.C. is merely an administrative tool whereby a tax can be collected and is not a necessary prerequisite to the making of a valid assessment. Accordingly, since it is clear that the assessments are procedurally correct any technical defect with respect to the levies can only affect such levies and not the underlying assessments and/or the liens created by the provisions of Sections 6321 and 6322.[3]

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[2] Pursuant to this statutory notice of deficiency, the plaintiff exercised his right to relief in the United States Tax Court by filing a petition for the redetermination of the deficiency so asserted and is presently actively pursuing this relief.

[3] It should also be noted on December 6, 1973, immediately subsequent to the making of the assessments, notices of tax lien were filed pursuant to Section 6323 of Title 26 U.S.C. so as to give any other creditors notice of the liens outstanding against the plaintiff Samuel Shapiro.

II

EVEN IF THE LEVIES MADE ON DECEMBER 6, 1973, ARE DEFECTIVE, THE TAXPAYER IS NOT ENTITLED TO THE RETURN OF ANY MONEYS HERETOFORE COLLECTED PURSUANT TO THE LEVIES

As is pointed out above, any defect in the making of the levies does not in any way invalidate the assessments or the liens created by the assessments, but rather, they merely affect the enforceability of any levies. It therefore follows that before the plaintiff is entitled to the refund of any moneys collected which have been applied to his tax liability he must establish that he does not owe any taxes, *i.e.*, either the Tax Court must determine that the deficiencies set forth in the statutory notice of deficiency mailed to him on December 21, 1973, were not proper or this Court, after an action properly filed for the refund of taxes paid, pursuant to Section 7422 of Title 26 U.S.C. and Section 1346(a)(1) of Title 28 U.S.C. must determine that he does not owe any taxes and is entitled to a refund thereof. This question most certainly cannot on the Motion for Summary Judgment now before this Court be resolved. It should be deferred until such time as the Tax Court enters its decision on the issue of the taxpayer's liability or in any event, should be deferred until this Court makes its factual finding with respect to the basis of the making of the assessment as is required by the mandate of the Court of Appeals. In the event this Court elects to proceed to make a determination in accordance with the mandate of the Court of Appeals, it is questionable whether this Court could convert the present action into an action for the recovery of taxes pursuant to the provisions of Section 7422 since, if this action is deemed to be an action for the refund of taxes, it would have automatically been stayed by the provisions of Section 7422(e) upon

the filing by the plaintiffs of their petition with the United States Tax Court. Therefore, it is respectfully submitted that any determination as to whether the plaintiff Samuel Shapiro is entitled to the return of any moneys is premature and must be deferred until such time as either the Tax Court enters its decision and/or this Court makes its factual determination as required by the mandate of the Court of Appeals and the stay provided for by Section 7422(e) is lifted.

Respectfully submitted,

/s/ JOHN J. McCARTHY
John J. McCarthy, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ STEPHEN G. FUERTH
Stephen G. Fuerth
Assistant Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Of Counsel:

EARL J. SILBERT
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Motion for Summary Judgment Filed by the Plaintiffs and Memorandum of Law in Support of the Response to the Motion for Summary Judgment Filed by the Plaintiffs was served upon counsel for the plaintiffs, Nathan Lewin, Esquire, 1320 19th Street, N.W., Washington, D.C. 20036, this 10th day of October, 1974, by United States mail, postage prepaid.

/s/ STEPHEN G. FUERTH
Stephen G. Fuerth

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed October 29, 1974]

ORDER

Upon consideration of the Plaintiffs' Motion for Summary Judgment filed on May 30, 1974, and the opposition thereto, and it appearing to the Court that the government has effected a second set of levies upon Plaintiffs' assets, it is by the Court this 29th day of October, 1974,

ORDERED that Plaintiffs' Motion for Summary Judgment be and the same is hereby denied, without prejudice, as moot; and it is

FURTHER ORDERED that Defendants file with the Court and serve on the Plaintiffs by October 31, 1974, the factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculation of the deficiency has a rational basis, so that the Court can determine if the claim is "entirely excessive, arbitrary, capricious, and without factual foundation." *See Shapiro v. Secretary of State,* No. 73-2260 (D.C. Cir., May 15, 1974), at 10; *Lucia v. United States,* 474 F.2d 565, 573 (5th Cir. 1973). And it is

FURTHER ORDERED that a hearing in this matter will be held on November 5, 1974, at 9:30 a.m.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

[SEAL]

APPENDIX D

[Letter of Nathan Lewin to District Director of Internal Revenue dated December 11, 1973 (Exhibit 4 to complaint)]

LAW OFFICES

MILLER, CASSIDY, LARROCA & LEWIN

1320 19th Street, N.W. - Suite 500

Washington, D.C. 20036

Area Code 202

Telephone 293-6400

December 11, 1973

District Director of Internal Revenue
120 Church Street
New York, New York

Attention: Mr. Victor F. Godfrey

Subject: Samuel Shapiro
4 Joan Lane
Monsey, New York 10952
Identifying No. 132-32-8801

Dear Sir:

On December 6, 1973, your office issued Notices of Levy with regard to the above taxpayer on the following:

(1) Chemical Bank, Route 59, West Nyack, New York 10960;

(2) Nanuet National Bank, Route 59, Monsey, New York;

(3) The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York;

(4) Fred Topper, 85 Baxter Street, New York, New York.

On that same date a Notice of Seizure was also served on the Empire National Bank, 102 Route 59, Monsey, New York. With regard to the above five actions, I received copies of the forms at the office of the Internal Revenue Service on December 10, 1973. I have also been advised that a lien was filed in Rockland County, New York, to cover all real property owned by Mr. Shapiro.

This action was taken by the Internal Revenue Service with knowledge that on Sunday, December 9, 1973, Mr. Shapiro would be surrendering voluntarily at the United States Courthouse, New York, New York, for departure to Israel under an extradition warrant. The terms of this surrender were negotiated in great detail between myself, as counsel for Mr. Shapiro, the Department of State, and the Government of Israel, and the terms were known to the Department of Justice. As reflected in a letter to me from the Department of State dated September 19, 1973, the assurances to Mr. Shapiro by the Government of Israel were the following (these are quoted precisely as stated in the letter to me):

"(1) That extradition be delayed until after the birth of his child, expected in November, and the religious ceremonies incidental to this birth;

(2) That Shapiro be allowed to remain at large in Israel until acquittal or conviction; and

(3) That trial be continuous."

These three terms were specifically the subject of formal Diplomatic Notes which were exchanged between the United States and Israel on August 16, 1973, September 4, 1973, and November 9, 1973. The first of these conditions came

to pass on November 15, 1973, when Mrs. Shapiro, a native-born American citizen, gave birth to a girl in New York. Pursuant to further discussion with the Department of State and representatives of the Government of Israel and of the Department of Justice (which was representing Israel in judicial proceedings pursuant to treaty), it was agreed that Mr. Shapiro would leave the United States on December 9, 1973. In the course of these discussions it was made clear to all parties by me that in order to achieve the second of the above conditions, the funds which Mr. Shapiro presently has in the United States and which are pledged as security for his appearance in the extradition proceeding and in the proceeding before the Immigration and Naturalization Service would be needed and would be used to secure his release on bail in Israel. At the suggestion of an official of the Embassy of Israel, arrangements were made with Bank Leumi for the deposit of those funds with a branch of that bank in New York upon the exoneration of bail when Mr. Shapiro leaves the United States. On the basis of that security and whatever else could be scraped together by his family in Israel, a branch of Bank Leumi in Israel is ready to issue the necessary bank guarantee to enable Mr. Shapiro to be free on bail until his trial on the charges pending in that country.

It came as a total surprise to me and to Mr. Shapiro to learn for the first time on December 6, 1973 – three days before he was scheduled to leave the United States for an extended period – that there was some question about his tax obligations in this country. No prior suggestion had been made to him from any source about any such issue, and there was never a request for an audit. Officials of both the Department of State and the Department of Justice with whom I communicated when I heard of the jeopardy assessments on December 6, advised me that they had no prior notice that this would happen and, using their words, that they were "shocked" by this action.

As matters stand now, Mr. Shapiro's extradition has been rescheduled for December 16, 1973. If he were to leave the United States with the Notices of Levy in full force and effect, the consequence would be that he would not have the funds for bail in Israel, and that he would, accordingly, be in jail until his trial. He is anxious to resolve the matter of his alleged tax liability as quickly as possible, and he has repeated to me several times that he is firmly of the view that he has no tax liability and that his tax returns were accurate. He is prepared to litigate the question at the earliest possible time and would go into Tax Court to challenge any notice of deficiency promptly upon its issuance.

It appears quite clear, I would think, that it would be a denial of Mr. Shapiro's right to contest the alleged tax liability and of his right to the assistance of counsel in this regard if the United States denies him the opportunity to litigate and to be available to his attorney. By freezing his assets, as it has done with these Notices of Levy, it has, for all purposes, achieved that result.

As I am sure you are aware, the courts have sustained the jeopardy assessment procedures and have found them to be within constitutional bounds *only* on the premise that they provide a taxpayer with a fair opportunity to contest the findings of liability within a prompt period after his assets are frozen. By surrendering Mr. Shapiro pursuant to the extradition requests on the one hand and freezing his assets so that he cannot make bail in Israel on the other, this constitutional premise for the jeopardy assessment procedure is eliminated.

Moreover, the situation is aggravated by the fact that Mr. Shapiro, on my advice, voluntarily surrendered his right to Supreme Court review of the legal questions relating to his extradition in exchange for an understanding from the United

States, acting through the Department of State, and from the Government of Israel that certain conditions, including pretrial release, would apply upon his voluntary return to Israel. By now freezing his assets, the United States – acting through the Internal Revenue Service – has breached this term of its agreement.

As I stated previously, we are ready and anxious to resolve the matter of tax liability administratively, or in an appropriate court, at the earliest possible time. That goal could be accomplished by permitting Mr. Shapiro to remain in the United States until this question is resolved. There have, however, been solemn international obligations assumed in this regard, and Mr. Shapiro has agreed – and is now fully ready – to return to Israel under the terms of those agreements. In these circumstances, it behooves the Internal Revenue Service to work out an arrangement under which the tax liability question may be resolved while he and his family are given due process of law. Since Mr. Shapiro's wife and child will remain in the United States and since he and his wife jointly own real property located in Rockland County, I would think that the Internal Revenue Service's interest in collecting any possible judgment is substantially protected by the lien filed on real estate. If, however, the Internal Revenue Service should deem it necessary to have some additional security, I propose the following arrangement:

(1) The funds which are now the subject of the Notices of Levy – and which are, I might add, presently being held as security for his appearances before the Immigration and Naturalization Service and in the United States District Court for the Southern District of New York – would be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of the bail to be posted upon Mr. Shapiro's return to that country, which amounts to 250,000 Israeli pounds (approximately $60,000).

(2) An agreement could be entered into under which the Internal Revenue Service would have a security interest in those funds second only to the interests of the Government of Israel (or the bank, if it is required to pay on its guarantee) to secure against any tax liabilities determined after administrative resolution or litigation of the tax claim.

This arrangement would, I submit, adequately protect the Internal Revenue Service's interest while permitting Mr. Shapiro – albeit under extremely difficult circumstances – to defend against tax claims now being made. If such an accommodation can not be arranged, it is patent that Mr. Shapiro and his family are being denied due process of law – a constitutional right which is absolutely guaranteed to them. It should not be forgotten, in this regard, that what he is leaving in the United States is a baby not yet one month old and his wife – both of whom will be living under extremely strained circumstances occasioned not only by his absence but by the fact that all the funds that he has available will be frozen to permit him to be released while he is in Israel.

I am sure I need not impress upon you the need for an immediate resolution of this question, involving as it does sensitive international relations. I am sending this letter to you on the day after I met with agents of the Internal Revenue Service (and was able to receive from them no detailed information regarding the alleged liability), and I urge you to act on this request with the dispatch that it obviously deserves.

Sincerely yours,

Nathan Lewin

NL/pc

APPENDIX E

[Remarks by Donald C. Alexander Commissioner of Internal Revenue prepared for delivery before the annual convention of the tax section of the American Bar Association, Honolulu, Hawaii, August 14, 1974, 1:00 P.M., HDT*]

Within bureaucratic circles, the IRS is regarded as one of the Federal Government's best organized and best managed agencies. Now, as some of you outside of the public sector are aware, I have undertaken to make a number of changes in the operations of the Internal Revenue. In spite of that fact, I would concur that I find the Service to be, on the whole, an effectively managed institution staffed predominately with high caliber professional personnel. I am, of course, very pleased that this is the case and that I am able to stand here before you this afternoon and tell you so.

However, in all candor, I *could* wish that the Service's image wasn't quite as good as it is among the leadership of the Federal establishment. In fact, once I even considered – but rejected – the possibility of leaking some trumped-up stories to the press about how poorly we were doing in some areas, so the other Federal planners and executives would leave us alone and quit trying to give us additional responsibilities, particularly in the non-tax areas.

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* 6:00 P.M., EDT

NOTE: This text is the basis of Commissioner Alexander's oral remarks. It should be used with the understanding that some material may be added or omitted during presentation.

My discussion of the Service's management image is by way of setting the stage for my topic this afternoon, "Redefining Tax Administration". One of the results of the reorganization which the Service went through in the early 1950's was that it came out of that exercise with a very modern, orderly organizational hierarchy. A good hierarchial structure, when you see it on a wall chart, looks rather like a pine tree – you know, like a child's image of a Christmas tree. The IRS has presented such an attractive Christmas tree to the various Federal policy makers and planners over the past 15 or so years, that they hung a number of ornaments on us that did not really belong there.

During that period of time, the Service became involved with the enforcement of the expanded Fire Arms Control Act, information gathering for Revenue Sharing, the Economic Stabilization Program, the enforcement of Federal energy conservation activities during the past eight months or so, and presently some are talking about the possibility that the Service would be the organization to administer the income maintenance or so-called "negative income tax" program for reforming the Nation's welfare system.

In this particular case, they have said, "Now, the Internal Revenue is so well organized and so well managed that it would carry off the job most effectively". But surely the Internal Revenue Service does not have a monopoly on effective techniques of organization and management in the Federal Government. Then it was suggested that this program, which is admittedly going to be a very sensitive one regardless of who administers it, would be better placed in the Internal Revenue Service because Congress won't interfere with us as much as they would with other agencies. A response to that is found in a volume of transcripts from the Montoya hearings almost a foot thick. You know, I have spent a lot

of my time with the Senator and his committee during the past year. But then they said the Internal Revenue Service would be *less emotional* about running this very controversial program. Well, maybe tax men are a little more calculating and rational then social scientists and economic planners. But all they've really said is that it's going to be a hard job to do right; well, so is tax administration!

Now, I don't mean to imply that the IRS will shirk its duties. If something is really part of the tax system, it is indeed our responsibility. But it doesn't become part of the tax system simply because it may be labeled as such. Having said that, I will now say that if a job is assigned to us in the future, we will do our best to do it – just as we have done in the past.

Tax administration is always going to be a hard job. What's more, no matter how well IRS does it, there will always be room for improvements. I would like to discuss with you this afternoon some of the things that we have done, that we are doing, and that we are going to try to do in order to improve Federal Tax Administration.

It is no accident that I have chosen to group these efforts to improve our management of the nation's Revenue laws under the title "Redefining Tax Administration". Over a period of years, the definition of "Tax Administration" has been altered and expanded to the point that some of our important basic goals and responsibilities have either been subsumed or jeopardized. This diffusion of purposes and resources has been brought about, in large part, by three different sets of influences. The first has been through placing additional responsibilities upon the tax administration organization. The second has been through the use of the existing tax procedures and powers for purposes other than those of the tax system itself. The third, of lesser concern to the

tax administrator, has been through the revision and expansion of the Internal Revenue Code to include provisions whose principal purpose is other than that of raising revenue or defining what should be taxed. Each of these actions or, rather, groups of actions, has had an influence upon the manner in which the definition of "Tax Administration" has evolved over the years. These same influences have also affected the manner in which the Tax Administration charter has been carried out.

Even prior to my coming with Internal Revenue, I had become concerned with the degree to which I believed that some of these factors were impinging upon the administration of our tax laws. My experience as Commissioner quickly showed me that my concern was well placed, and I began to take steps to ameliorate this situation. I would like to spend the next few minutes discussing some of the results of these efforts.

With respect to removing the inappropriate ornaments from the IRS Christmas tree, I believe we have made very good progress. The Alcohol, Tobacco, and Firearms organization was transferred from the IRS to the direct jurisdiction of Treasury Department in 1972. Still, the Internal Revenue continued to provide its former component with administrative support in a very large way throughout Fiscal Year 1972. Today, however, the Alcohol, Tobacco, and Firearms Bureau of the Treasury is very largely on its own, and the support resources which the IRS had been expending on the ATF organization are now once again available full time to support the business of Tax Administration.

Of course, in a more dramatic and massive area of activity, the Service divested itself of its enforcement functions under both the Economic Stabilization and Federal Energy Programs. The death of the Economic Stabilization Program

was mandated by Congress, so we can take little credit for that. However, the Service was under some pressure to retain some of its enforcement functions for the Federal Energy Office for an indefinite period of time. I am pleased to say that we successfully managed to stave off that particular initiative.

Although none of the three activities I have just mentioned affected our interpretations of the tax laws or the manner in which we administered them, they did affect the levels of service which we were able to provide, and in some cases, the quality as well. For example, Taxpayer Service Representatives, whose principal function is to respond to public inquiries and offer assistance to those in need of help in meeting their tax obligations, were seriously affected by our involvement in the Economic Stabilization and energy enforcement activities.

In many locales, taxpayers had to compete with citizens seeking information regarding these other, non-tax activities; and I make no bones about it, we do not have these Taxpayer Service Representatives in sufficient number to meet the legitimate demands of the taxpayers, as it is. Moreover, these Representatives were required to learn and maintain up-to-date operating knowledge of not only the Internal Revenue Code, but the Stabilization and Federal Energy regulations as well. Now, with the departure of these two programs, we anticipate a significant increase in both the quality and quantity of the Taxpayer Service we will be able to provide. We will also be able to return slightly more than 1,000 experienced Revenue Agents to the field and the auditing of tax returns. Added to that, of course, our administrative people will now be able to devote their full time to the support of tax administration.

While the kind of influences which I have just cited have a measurable effect on both the level of resources devoted to the tax administration effort and the quality of that effort, they do not significantly affect the integrity of that effort. There are influences, however, as I indicated earlier which *do* affect that integrity. These influences arise most often when either the framing or the application of tax laws do not have the raising of revenue as their principal objective.

For centuries, governmental power to tax has been used in a multiplicity of ways transcending the simple, straightforward function of raising revenue. Taxation has been used as an agent of morality – witness the traditional taxation on alcohol, tobacco, and other drugs; gaming and amusement devices, etc. Taxation has also been used as a private interest tool – a number of years back, there was a special tax on margarine to make butter more competitive against it. This was pushed through the Congress by the dairy interests, and the Internal Revenue Service administered it during the 1920's and 30's.

Today, fortunately, the United States has only a limited number of such taxes. For those few which we administer, I believe it is of utmost importance to the integrity of the Tax Administration that we do so with impartiality, and, in the absence of any Congressional charter to the contrary, that we place no particular emphasis on any one tax or group of taxes over that which we place upon any other.

For the Internal Revenue Service to place a disproportionate emphasis on collecting one particular tax or enforcing the revenue laws for a particular group of people, in effect, puts the Service in a position of setting itself up as a judge between good and bad in our Society. Clearly, under such circumstances, the IRS ceases to view all taxpayers as being

equal before the law. Such practices by the Service, however rightly viewed and supported by other forces of the Federal Executive, by Members of Congress, or even by a large portion of the population in general, can only serve to the detriment of the integrity of the Tax Administration System. Selective enforcement of tax laws, designed to come down hard on drug dealers or syndicated crime, for example, may be applauded in many quarters, but it promotes the view that the tax system is a tool to be wielded for policy purposes, and not an impartial component of a democratic mechanism which applies equally to all of us. I need not tell you here this afternoon that the Service is already having some public image problems in that respect.

One aspect of this program applies to public institutions across the board. We are victims of our own image making, because, after all, public policy makers, planners and bureaucrats are also members of the public at large. The images which we create with our press releases and our public statements feed back to us and we believe what we are saying and we build on that. Let me give you an example of what I mean. Back in the 1930's, almost by accident, we stumbled upon the efficacy of the Bureau of Internal Revenue in combating organized crime, which had, up to that point, been practically impervious to the standard methods of law enforcement. So, tax problems got Al Capone and a number of the other more notorious luminaries of the criminal world during the 1930's. Internal Revenue performed impressively, and the public, at the urging of the media, was impressed. In fact, we impressed ourselves as well. Gradually, law enforcement officers and public leaders began to see in Internal Revenue a useful tool that they could apply not only to organized crime, but to other areas of criminal activity which were difficult to detect and to prosecute under traditional law enforcement methods.

During the period of social and political turmoil, which began in the 1960's and developed up through the early 70's, the forces of hard-line law and order promoted the use of the Internal Revenue Service as a *generalized tool for criminal law enforcement.* IRS participation in the Organized Crime Drive of the Justice Department and in Federally-led strike forces in the major cities around the country were the first manifestations of this movement. Following that, there came the Narcotics Traffickers program. In part as a result of the adoption of this general philosophy, in 1969 Internal Revenue created a staff to collect information on the financial affairs of a variety of right and left wing organizations. Congressional Committees and others were concerned that these organizations were being used to funnel tax-exempt money into various violent activities. Although this Special Service Staff did nothing but collect information and forward it for review by different functions, I ordered it terminated on August 9, 1973, because its existence implied that the Service was concerned with activities, legal or illegal, that had little direct relationship to the administration of the tax laws. My point in bringing up the Staff and the other special law enforcement applications of the IRS is to indicate the degree to which the orientation of the Internal Revenue Service, and thus, the "definition" of Tax Administration was being altered by its selective use over that period of time.

This reorientation of purpose was manifested by Service operations in a variety of ways, both large and small. An example was the Service's reaction to tax resistance related to the Vietnam War. During the late 1960's, antiwar groups identified nonpayment of the telephone surtax as having great potential to disrupt the tax administration system, and they urged, through their publications and at their gatherings, that people engage in large scale noncompliance with this

tax. Now, the amount of this tax is extremely small – it generally comes to only one or two or three dollars per month for most individuals – while the cost to the IRS to bring its active collection process to bear on such delinquencies is obviously many times in excess of those amounts. The antiwar groups were well aware of this disparity and they made their intentions clear in their public statements. They hoped to bring the nation's tax collecting mechanism to a halt by overwhelming its resources with thousands of tiny delinquent accounts.

Obviously, they did not achieve their objective; nor did they even come close. Still, in some of our largest districts, they did manage to generate a substantial number of delinquent accounts to which the Service's reaction was precisely as they had anticipated. Many Revenue Officer manhours were wasted by deciding to emphasize the collection of these delinquencies, giving them a higher priority than the collection of delinquencies arising in the normal course of IRS operations.

I have ordered a stop to such selective priority-setting. Once again, however, it is not my intention here to debate the correctness of the response to a particular situation. My point here is that the definition of Tax Administration was permitted to stray from its proper emphasis. If our Tax Administration is either permitted or encouraged to respond selectively to such socio-political phenonema as are likely to crop up from time to time in our pluralistic nation, or if it permits itself to be used as a selective tool which places criminal enforcement or other criteria before revenue collection and enforcement, we may be jeopardizing our traditional tax administration processes, both from the standpoint of the most effective use of our resources and from the standpoint of the public's faith in an impartial, non-political tax system.

Now, what have we in the IRS done to "redefine" our working understanding of Tax Administration? In addition to doing away with the Special Service Staff, we have changed the criteria for IRS involvement in antinarcotics and strike force activities. Today, such activities must satisfy the revenue and professional criteria which have long been established within the IRS as guides for channeling our resources. In other words, in the future, special activities will have to compete openly and equally for resources against our regular tax administration activities. At the same time, we are tackling influences which have, over the years, crept into *our own* standard practices and procedures. I have reference not so mucy to manifestations of selectivity such as the telephone surtax situation, but rather to the more subtle incursions into our basic enforcement policies and procedures.

Now, I asm sure you all know the Service's resources have never been sufficient to permit us to audit anything more than a small percentage of the total number of returns that are filed each year. Over the past 25 years, a number of policies and procedures have been developed to assure that the Service, and ultimately the public, get the maximum utility out of their tax collection dollar. Many of these developments have been wise and fair; I am thinking particularly of the Discriminant Function, or DIF technique which, on the basis of mathematically determined criteria, identifies returns whose characteristics suggest a high probability that they contain erroneous items. A measure of the effectiveness of this technique is reflected by the fact that, while roughly 41 percent of our audits generated no change in tax liability prior to the use of the DIF technique, only 28 percent of the returns selected for district audit by our computers applying the discriminant function criteria resulted in no-change determinations.

Our Taxpayer Compliance Measurement Program is also quite effective in identifying areas of noncompliance. We are also constantly improving the quality of our audits as well, both through improved methodology, such as package audits, and through the application of modern technology as represented by our expanding program of computer-assisted audits. While we have been developing these and other sound programs for enhancing our effectiveness, however, we have also evolved some policies and practices which, although initially based upon apparent logic, may have generated counter-productive tax administration decision-making.

For example, the Service has had a long-standing policy which encouraged field personnel to concentrate enforcement efforts on cases with maximum "publicity potential", and stated, in part, that the purpose of criminal enforcement was to make an example of the offender. The original intent of this policy was clear, and laudable to the extent that it achieved its goal – that is, maximizing the deterrent effect arising from those cases which we successfully completed, by assuring that the public in general was made aware of the Service's enforcement activities. However, this policy, like those resulting in an excessive emphasis upon drug dealers or antiwar protesters, could have the effect of directing a disproportionate share of the Service's enforcement efforts and resources toward a relatively small segment of our total population. This might mean that certain other portions of our society would escape their obligations. Both aspects, in my view would seem inappropriate from the standpoint of a fair and impartial administration of the nation's revenue laws.

Along much the same line, our own fascination with the Service's image as a "law enforcement" agency began to affect the manner in which we applied certain of our enforcement policies. For example, a long-standing IRS procedure

cautioned against the uncoordinated pursuit of civil enforcement actions where a criminal enforcement action was pending. The original purpose of this policy was to avoid accidentally imperiling the criminal prosecution potential in such circumstances.

In application, however, the policy gradually led to a situation in which our normal audit and collection activities began to adopt a "hands-off" attitude toward all taxpayers against whom a fraud investigation was pending. This attitude applied regardless of the potential merits of the pending fraud investigation or the degree of relationship between the fraud issues and the legitimate civil actions which the Service might have pending regarding the taxpayer. Now, this was a prime example of public policy being set by bureaucratic momentum;organizational practice translated an otherwise prudent procedure for coordinating certain exceptional situations into a reinterpretation of the basic tax administration charter, whereby the IRS responsibility for equitable assessment and collection of revenue appeared to be subordinated to the goal of criminal law enforcement. As a result of this reinterpretation, normal audit assessment activities could have been delayed, and the collection of tax liabilities could have been jeopardized as taxpayer's assets were either depleted, or removed from ready access. There was a clear potential for the criminal fraud investigation process, originally conceived of as a tool to be used in extreme situations, to become the tail that wagged the IRS civil enforcement watchdog.

During the past several months we have reviewed and revised this entire area, and a new policy statement has been issued. Under the revised policy, the instances when criminal enforcement actions may take precedence over civil enforcement actions are precisely defined, and are far more restricted than they were under the previous policy. As a

general rule, civil enforcement actions for tax liabilities arising from taxable periods other than that for which the taxpayer is under criminal investigation, or involving different types of tax from that for which the taxpayer is under investigation, regardless of the tax period, will proceed concurrently with a criminal enforcement action, except under circumstances in which a district director authorizes suspension of civil enforcement pertaining to a specific individual case.

Further, in cases where civil enforcement actions against a particular taxpayer have been suspended because of a pending criminal enforcement action involving the identical type of tax or identical tax period for that taxpayer, provisions have been made for dropping such a suspension where the collection of the civil liability would be imperiled by continued delay, and where such peril appears to outweigh the criminal enforcement issues. In short, we are moving to assure that we make these decisions on the basis of informed, subjective judgment and relative merit, and not upon the basis of some absolutist doctrine. We recognize the great importance of criminal enforcement of the tax laws, but we are also aware of our civil responsibilities to administer the laws and collect overdue taxes.

These and other changes in our enforcement programs and policies have been evolving over the past 14 months, so it is a bit early yet to expect to see substantial changes in our performance. However, data regarding our operations during the fiscal year completed just last month do reflect some changes for the better. In fiscal year 1974, we were able to examine 16% more returns than we did in fiscal year 1973, with a more than 15% increase in the amount of additional taxes and penalties recommended. These improvements were achieved in spite of the Service's support of the Economic Stabilization and energy enforcement programs throughout

most of fiscal year 1974, and further, in spite of the number of our most experienced audit personnel who were involved in the training of more than 5,400 new revenue agents and tax auditors that we hired during that fiscal year. With the termination of the energy and Stabilization programs, and the deployment of the new hires from last year, we can expect our audit activity to take an even greater surge during the coming year.

As regards our intelligence operations, the overall emphasis of our criminal enforcement activities has been shifted away from special enforcement programs such as Narcotics Traffickers and Strike Forces, and have been aimed more directly toward the taxpaying public in general. This shift in emphasis has enabled us to achieve greater occupational and geographic coverage in our criminal tax sanctions are more equitably applied – reaching the broadest possible spectrum of society within our resource limitations I believe that our revised enforcement philosophy and not only achieves this goal, but more fully meets the intent of Congress in that our resources are being used for the enforcement of tax statutes, rather than as alternative methods for the prosecution of violators of laws normally enforced by other Federal or local agencies.

Lest I give the impression that my concept of redefining tax administration is limited to issues of enforcement, let me assure you that we are extending this doctrine of fairness across the board in all aspects of our IRS operations. A few years ago, for example, most rural taxpayers had to either write a letter or drive to town to get tax information from the IRS. Today, however, with the nationwide installation of the new long distance telephone system, every taxpayer in the country can call an IRS office, toll-free. What's more, we are placing these phone numbers on every notice that we

send to the taxpayer, so that he can call us for clarification of anything that he doesn't understand or that he doesn't agree with. To meet the needs of those whose jobs do not afford them time off during the 8 to 5 work-day, except at the cost of lost salary to themselves, we are experimenting with evening and weekend hours. We are also reexamining our guidelines and those of GSA regarding the location of our IRS offices, so that we can assure that dealing with the Service represents no greater burden on one group of citizens than it does upon another.

In our processing of receipts and returns, where our operations have already made extensive use of modern data processing technology, we are moving ahead with expanded applications of ADP, in many cases, with the aim of enhancing the equity of tax administration. The most ambitious of these undertakings relates to the processing of information documents. The Service receives hundreds of millions of these documents annually, relating to the payment of royalties, professional fees, dividends and interest, as well as to normal salaries. These are not fully checked at this time, but we examine many tapes reporting compensation, and we sample others.

To correct the situation, we are preparing to implement working on a full document matching program, including the potential use of optical scanning, to permit us to review the information documents from all taxpayers, which will then be cross-checked with their tax returns. We estimate that such a cross-referencing will identify substantial amounts of under-reported income which will, of course, be translated into additional tax dollars from those who underpay, and refunds to those who deserve them but do not apply for them, thus making tax administration more equitable.

In another processing improvement, we are working with Treasury and the Federal Reserve to see if we can't speed up the reporting of Federal Tax Deposits to the Service. At present, delays four to six weeks between the payment of tax to a member bank and the receipt of notice of that payment by the IRS result in our generating delinquency notices and otherwise troubling taxpayers who have already fully discharged their payment obligations. Such situations only promote the image of an inefficient tax administration bureaucracy. Also, these delays impair our collection activities; we need early warning when taxes are not paid on time.

Along the same line, we are also working with the Federal Reserve people and with our own revenue processing managers in the development of steps to appreciably accelerate the speed with which our local offices are informed of the FRB's receipt of bad checks for the purchase of FTD's. At present, the lag time between the issuance of such checks and the notification of local IRS offices that such checks have not been honored typically amounts to three months or longer. In cases involving individuai taxpayers, such delays pose only a minimum burden upon the Service's revenue processing mechanism. However, large employers normally pay their withholding taxes to us on a weekly or bi-weekly basis in increments amounting to tens of thousands of dollars.

The present lengthy delays in our receipt of notification that such withholding payments have *not* actually been made means that marginally solvent institutions may amass a very substantial tax liability before the Service becomes aware that the firm may be in financial difficulty. Under such circumstances there is clearly a potential, which is too often realized, for the accrual of a massive liability which adds to the firm's fiscal woes, jeopardizes the employees' rights, places additional claims upon the firm's limited resources,

thereby competing with the institution's other creditors, and curtails the Service's options for collection. Although the Service certainly cannot be held responsible for the circumstances which led, either to the firm's insolvency in the first place, or its incurring an enormous tax liability in the second, we do come in for more than our share of criticism whenever we are forced by such circumstances to take firm action to satisfy the government's just claims.

Of course, the thing that makes such situations doubly frustrating is that, although the delays are not the fault of the IRS, it is the Service which must take the blame for them. As I say, we are working with the Federal Reserve in an attempt to find an acceptable means to short-cut their processing of FTD's and their notification of dishonored checks, and I trust that we will be successful. If we are not, you can expect to hear me saying a lot more about this in the future, because I don't believe that the Service should take a bum rap for a problem that is simply not of its own making nor under its own control.

We are also working in the technical areas to enhance the fairness and openness with which we deal with all taxpayers. For example, I have had a Task Force created to examine the technical skills and knowledges required of our general managers in the field, so that we can assure ourselves that no matter in which district the taxpayer happens to reside, he will be afforded the same technical judgment and have his problems handled in as nearly as possible the same technical environment throughout the country. We can't construe a provision of the Code one way in Maine and an entirely different way in California. We are pursuing the use or advanced ADP technology in this area as well, with a project to put our technical rulings on a computer and have them available, up-to-date and readily retrievable in all districts of the Internal Revenue Service.

Added to all the foregoing, we have renewed our endeavors to simplify IRS forms, instructions, regulations and correspondence. Even prior to my confirmation as Commissioner of Internal Revenue, I became actively involved in this effort, because this was the area which I, as a tax attorney in the private sector like you, had come into the most common contact with the IRS. During FY 1974 Service personnel reviewed more than 1,600 form letters, notices, and stuffers to improve their quality, and to eliminate duplicative or obsolete communications. As a result of this effort, over 500 such items were cancelled outright or consolidated with other forms. Moreover, I have personally worked on the revision of the most frequently issued Audit and Service Center letters.

In response to concerns voiced during the Montoya hearings, the Service initiated a number of new publications and revised many more to explain tax law and tax administration processes to the public in nontechnical language. I believe that the revision of two particular IRS publications merit special mention in this context. Publication Number 556 has been expanded to provide the taxpayer with a clear statement of his rights and privileges as they relate to the IRS Audit process. This includes a straightforward explanation of the taxpayer's appeal rights which, I may add, are also now being referred to in all of our first contact audit letters. Publication Number 586 now sets forth the rights and responsibilities of taxpayers as regards the IRS Collection process.

The principal thrust of both these publications is to provide the average taxpayer with the kind of knowledge and understanding regarding our Audit and Collection processes which you and I and our clients have possessed for years, but which the man on the street has quite often found to

be unnecessarily mysterious. As a further general improvement in these areas, I have had it made a matter of IRS policy for the appropriate, free IRS publications to be referenced in all our pattern letters, tax forms, instructions, and regular correspondence. It just seemed to me that, as long as we had printed up all of this information material, we had an obligation to afford the taxpayers every opportunity to know of their existence and use them.

While these efforts have been aimed at improving tax administration across the board, it should be obvious that the principal beneficiaries of such clarified IRS communications will be the little man; the average taxpayer and the small businessmen who cannot afford high-powered legal or technical advice, and for whom the jargon of the Revenue bureaucracy is practically a foreign language. These efforts at simplification are integral to the redefinition of tax administration, since the degree to which we can sucessfully communicate to each citizen his or her own tax responsibility is yet another measure of the equitability of tax administration.

Although much of the technical sophistication of our publications and forms is required by the complexity of the tax law itself, all taxpayers found a number of improvements in their 1973 income tax packages. The instructions in general for both the Forms 1040 and 1040A were shortened and simplified, and we were able to include in the tax packages a directory of the toll-free IRS taxpayer assistance telephone numbers for the entire United States. Also, in filling out their returns, taxpayers were no longer required to list the recipients of contributions for which they had cancelled checks or receipts, now were they required to list the names and dates for claiming medical payments. We hope to do more with these forms for 1974, as I am currently working on these.

We will continue to do what we can in this respect to ease the burden of tax filing. But, any extensive simplification of tax forms or instructions must really be tied to revisions in the tax law. For example, in the 1972 tax packages, the Presidential Election Campaign Fund check-off was placed on a separate form from the 1040. There was a very low rate of participation in the program, and the separate form and the low participation generated considerable criticism of the IRS.

Now, there are a great number of other simplifications and clarifications to the tax forms and instructions which can be accomplished via the avenue of tax legislation. I am sure that you have been following the progress of the tax legislation presently being considered by the House Ways and Means Committee. I am pleased to say that among the items which have been subject to the Committee's deliberations have been a number of the tax simplification proposals recommended by the Treasury in April of last year, many of which originated within the IRS.

Time limitations prevent me from going into all of the various changes which have tentatively been adopted by the Committee but I would comment that I believe that the simplification of provisions for child care deductions and the extension of simplified tax table computations to cover taxpayers with incomes up to $20,000 both represent moves beneficial to a large number of filers. Although these decisions are only tentative, I have high hopes that the broad support so far evidenced for these and other simplification proposals will eventually carry them into law. Of course, as we are all aware, the 93rd Congress is drawing to a close with elections coming up in November. This may rule out any tax revisions this year. I am hopeful, however, that we can look

to the 94th Congress for some significant simplifying improvements, along with other, more substantive tax reform aimed at curbing questionable tax-shelter practices and various other abuses.

I would like to be able to say that the wide-ranging efforts which I have discussed with you today have done the trick, that the Service now has its feet firmly planted in the proper direction, and that the "Redefinition of Tax Administration" requires but a short passage of time to become a reality. I would like to be able to say this, but it would not be completely true. One thing that I have learned in my relatively short career within the bureaucracy is that change is very difficult to achieve.

Let me hasten to add, before closing, that I do not wish to leave you with the impression that, in purifying the definition of Tax Administration, I am advocating an "isolationist" position for the Internal Revenue Service, or that I am turning a cold shoulder to *all* of the potential changes that the IRS may encounter in the future. On the contrary, there are a number of changes on the horizon that I welcome as real enhancements to sound tax administration in the United States. Three such changes come to mind which I would commend to you today.

The first of these deals with Title II of the Revenue Sharing Act of 1972, which provides for the collection of qualified state and local taxes by the Internal Revenue Service; a concept which has been labeled "piggybacking." Call it what you will, and I think piggybacking is an adequate shorthand for the concept, I believe that this is the way to go in the future. The potential economies-to-scale are patent and substantial. This concept constitutes a rather significant departure from standard practice in the past, and for that

reason it has been a little slow in coming since the passage of the act nearly three years ago; but I can assure you that I am pressing vigorously for the completion of the necessary regulations and guidelines so that individual states who are willing to participate in this program will be able to do so at the earliest possible date.

Another, more recent legislative mandate for the Internal Revenue Service is the Pension Reform Act of 1974, and I want to assure all of you that I wholeheartedly endorse this mandate. The IRS has long been involved with the examination of private pension funds, whose assets today amount to approximately two hundred billion dollars. In the course of our long-standing role vis-a-vis these funds, IRS representatives have witnessed some unsatisfactory practices and the mismanagement which, in some cases, have resulted in the bankruptcy of trusts and the loss of employees' retirement savings, yet it has been difficult for us to act effectively. The new legislation will provide additional sanctions that we need. Of course, Internal Revenue's interest in these matters is a good deal more than simple altruism. We are principally concerned that institutional payments to these funds are ultimately used for the purposes for which these institutions receive tax deductions.

In fact, I think I can say that the new Pension Reform legislation, rather than distorting or inappropriately broadening our tax administration role, represents a happy coincidence of interests, whereby the fair and equitable application of the tax law will serve to benefit both the employees covered by such plans and the taxpaying public as a whole. In addition, the Pension Benefit Guaranty Corporation, which is being created by the new legislation, will provide insurance coverage to the roughly two thirds of the private pension plans which are not presently afforded such protection. Of course, the PBGC will also have a strong interest

in seeing to it that these pensions are soundly administered, and you can bet that our people will be working very closely with theirs in carrying out our respective responsibilities under the new act.

The third positive change which I see on the horizon for the IRS is an innovation of the Service's own making; this is the first overhaul of our automated Master File system since it was initially installed in 1960. This new system will make the fullest possible use of the most up-to-date developments of information technology in speeding our processing, keeping tax accounts correct, reducing our errors and detecting those of taxpayers, improving our assistance to the public and, perhaps most important of all, enhancing our ability to assure the taxpayer's right of privacy. Under the new revenue accounts management system, which is presently being designed, a variety of sophisticated mechanisms and procedures will be employed to protect all information regarding the taxpayer and his dealings with the IRS from unauthorized access and disclosure. These defenses will be even more stringent than those built into our present ADP system.

You know, this privacy issue is looming very large in the public forum, and in the legislatures throughout this country, and I rather imagine it is going to be with us as a topic of heated public debate for some time to come. I would just like to say that I am somewhat concerned that the privacy issue may become distorted by some overzealous defenders of individual liberty. We cannot bury the issue of privacy by passing legislation which would restrict institutions, either private or public, from collecting or keeping *necessary* personal data on individuals or organizations. We are living in an information age. If our institutions are going to meet their responsibilities to the public which they serve, then they are going to need information regarding that public.

If our institutions are going to respond effectively to energy shortages or aberrant economic developments, if we are going to plan for adequate medical and educational facilities, or make determinations regarding optimal capital investments, if we are going to run programs like Medicare and Social Security and if we are going to administer the revenue laws, then we are going to need personal data banks. Therefore, the issue should not be one of whether or not to collect necessary information but rather how to protect that information from disclosure and/or inappropriate use. The Internal Revenue Service, or any other institution, public or private, which collects personal data on individuals stands in a fiduciary relationship to the individual with regard to that data. In view of this, it seems to me that a vital first step is for our legislatures to strengthen and tighten laws making the misappropriation and misuse of personal data as much a criminal act as the misappropriation and misuse of funds held in a fiduciary relationship.

In this respect, the Internal Revenue Service has traditionally been on the right track. As I am sure you are all aware, the Service has long operated under strict antidisclosure provisions built into the Internal Revenue Code. We are not resting on our laurels, however. We have recently completed a thorough review of the antidisclosure provisions as a result of which we have developed proposed revisions to the Code which would reduce the degree of access to tax information that is presently permitted under law and would broaden the application of that law to areas not envisioned during the drafting of the 1954 Code. One aspect of the proposed revisions might place an additional burden upon the Service, since it would require the IRS to provide statistical studies to other Federal agencies, upon their request. But I willingly accept this burden for the Service, in lieu of the alterna-

tive, which would be to provide raw tax data to other Federal agencies for their analytical purposes.

While I'm on the subject of privacy, I would like to devote a moment or two to another, somewhat related topic, and that is secrecy. There are those who seem to confuse the concepts of privacy and secrecy, and somehow try to make secrecy the institutional concommitant of privacy. I do not believe that this is accurate or appropriate, particularly as regards public institutions. It seems to me that the workings of a public institution should be as open as possible to the public which that institution serves. That is, after all, what the Freedom of Information Act is all about. Except where the public knowledge of certain agency policies, practices, and procedures would impair the ability of that agency to accomplish its Congressional mandate of law enforcement, such an agency should have nothing to hide from the citizenry.

It was with this philosophy in mind that I announced, just two weeks ago when I appeared before the Senate Subcommittee on Administrative Practice and Procedure, that I had requested our Technical organization to open up the IRS ruling process.

As with some of the other IRS policies which I have discussed with you this afternoon, the traditional Internal Revenue policy of restricting the publication of tax rulings was based upon sound rationale. These rulings are made on the basis of specific details of individual taxpayer circumstances. The statute and regulations simply do not permit us to disclose this information. Moreover, apart from the specific requirements of the statute, general philosophical questions arise because many of these rulings involve discussions of the taxpayer's private affairs and plans for the future; thus, it could be (and was), reasonably argued that the information contained in these rulings was essentially proprietary, and its

revelation could be inimical to the taxpayer's interest. For a number of years, the foregoing reasoning did indeed seem to represent good and sufficient arguments for not publishing the great majority of our rulings.

When our policy in this area began to be seriously questioned, we found that our position on the general philosophical level, as contrasted with statutory construction, was not entirely satisfactory. Principally, we were troubled by our critics' argument that the contents of the private, or letter rulings might constitute a body of secret tax law, representing official positions on the interpretation of the Internal Revenue Code. The legal research and debate which went into producing these interpretations was paid for by the public, yet they were into producing these interpretations was paid for by the public, yet they were essentially available only to a relatively limited number of tax practitioners.

In addition to the substantive questioning of our basic rationale, these and other critics also raised a fundamental issue of principle regarding the letter ruling process, the issue of Internal Revenue's institutional integrity. Now, from the Service's point of view, this was merely an issue of image rather than of fact. There is no question in my mind as to the integrity of the Service in general or its technical rulings process in particular. However, so long as the bulk of our rulings remained closed to public access, the citizenry would have to take *our* word for our own integrity. Well, if you've read anything about the opinion surveys regarding the public trust of both private and public institutions in the past year or so, you can imagine how effective such a defense of integrity might be.

Public trust is absolutely paramount to maintaining the self-assessed voluntary compliance that makes our system of

tax administration possible. If such confidence is not forthcoming, as a matter of course, then we must gain it; we must demonstrate by our actions and our openness that we are entitled to the public's trust. In view of this, I determined that the tax ruling process should be opened up in the future. Now, we are not rushing into this change blindly; nor are we going to jeopardize the taxpayers' reasonable expectations or privacy in pursuit of our institutional self-interest. Our Technical people and our Chief Counsel's office are working to determine the best manner of achieving a maximum degree of public access.

Obviously, we have not worked out the complete details of this change. For example, we have reservations about the extent to which we should release trade secrets submitted with requests for mandatory rulings, those rulings that the taxpayer is required by law to seek, for example, under Section 367 or to change either the method or period of his accounting. Similarly, we will not publish the two thousand or so Technical Advices which we issue each year, inasmuch as they are involved exclusively with the audit process. However, we believe that we will be able to provide access to all letter rulings; we plan to achieve this access by asking all taxpayers to include a waiver of confidentiality in their request for rulings.

As a footnote to this new policy, I would like to make it clear that this change is prospective and not retroactive; thus, it does not affect our position regarding the Tax Analyst and Advocates suit, presently in the Court of Appeals, which aims to force the Service to open all *past* letter rulings to the public. Such a course of action remains unacceptable to us because of the specific requirements of the Code and Regulations.

The decision to open the tax ruling process will be realized in practice sometime during the Fall of this year. At approximately the same time, or perhaps a little earlier, the Service will take yet another step in the direction of increased openness; this will be the completion of the release to the public access of the bulk of the Internal Revenue Manual. Currently, we are working on the process of dividing that part of our manual that has not already been released, into two portions; one public, and the other "protected." The protected portion of the manual will be restricted to law enforcement activities only; all other aspects of our policies and procedures will be open to the public scrutiny.

In seeking to "redefine tax administration", I am well aware that I may be promoting a losing cause. I say this because I know that my position rests upon principle, and principles and ideals have been losing more and more battles to pragmatism and expediency in recent years. Principles aside, for example, the proposal that the IRS administer an income maintenance program is, after all, not without its pragmatic appeal. As one of my colleagues has observed, we don't even have to change our stationery; we'll still be the IRS – The Income Redistribution Service.

Beyond the concrete proposals now under discussion for broadening the IRS role, I can see reasonable men advancing new ideas; for example, charging the IRS with the responsibility for policing almost all activities – not just tax – of multi-nationals. Moreover, I am not full certain that we are out of the controls business for good. Further, if the 94th Congress does undertake a full-scale revision of the 1954 Code, I would not be surprised to see a whole raft of new provisions aimed at promoting protection and restoration of the environment built into the Revenue provisions. This would thrust our enforcement and rulings processes

squarely within the jurisdiction of the Environmental Protection Act, and put the Service right in the middle of a highly volatile sector of public concern.

In summary, I feel rather certain that the continued integrity of Tax Administration cannot rest with the actions of one Commissioner, or be reasonably assured through a single, short-term re-orientation of the IRS. Rather, it will be, of necessity, an ongoing effort requiring the conscious participation of our political leadership, IRS management, and the tax law profession, of which I am proud to number myself a member.

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APPENDIX F

[Article appearing in Wall Street Journal, Monday, May 19, 1975].

Bureaucratic Tug-of-War

JUSTICE DEPARTMENT AND IRS ESCALATE FIGHT OVER USE OF TAX MEN ON CRIME 'STRIKE FORCE'

By Mitchell C. Lynch
Staff Reporter of The Wall Street Journal

WASHINGTON – In happier days, William Smith found true exitement and intrigue at his job with the Internal Revenue Service.

Mr. Smith (that isn't his real name) was an IRS auditor with a Justice Department "strike force," working full-time with Federal Bureau of Investigation agents and other law enforcers in a battle against organized crime. Armed with a pencil instead of a pistol, Mr. Smith helped send some crooked public officials, racketeers and Mafia men to prison.

But his role in the fight against big-time crime ended abruptly last July when IRS Commissioner Donald Alexander pulled tax men off the 17 strike forces across the country. Mr. Smith, disliking the thought of returning to his relatively mundane job at the tax-collection agency, left the federal government and now has a job with a private concern.

"I was pretty disappointed when I was told I had to leave the strike force," he says.

Justice Agency Angered

While Mr. Smith was disappointed, the Justice Department became downright angry. William Saxbe, who was Attorney

General then, fired off a letter to IRS Commissioner Alexander saying the withdrawal action had "dealt a severe blow to the strike-force effort." And now the new Attorney General Edward H. Levi, is planning to go over Mr. Alexander's head, according to Justice Department sources, and seek a reversal from the IRS chief's boss, Treasury Secretary William Simon.

To the Justice Department, the reason IRS auditors are needed full-time is simple: Organized crime fundamentally deals in the illicit procurement and use of money. "Track down where the money came from and where it goes, and you've got your man," says a top Justice Department official.

But Mr. Alexander sees things differently. The sole function of the IRS, he says, is to gather in all the tax revenue legitimately owed the federal government. The tax agency, Mr. Alexander declares, wasn't set up to be "a generalized tool of law enforcement."

Some others in Washington say that beneath the substance of these arguments is a more basic cause of the dispute: bureaucratic jealousy. "Alexander started it off by making a big fuss over nothing," says a government man familiar with the controversy. "Now Levi's getting drawn into it and he's drawing Simon into it. That's pretty heavy artillery for a pea-shooter incident."

The strike-force concept was developed in the 1960's to coordinate the major law-enforcement agencies against organized crime. Besides the IRS and FBI, the agencies involved include the Secret Service, the Labor and Postal departments, the Treasury's customs and alcohol, tobacco and firearms branches, with help now and then from the Securities and Exchange Commission and state and local police agencies.

The New York strike force even has representatives of the Royal Canadian Mounted Police.

"It's the team approach," says a strikeforce official in Washington. "For the first time, we have a coordinated program against organized crime." The main targets include illegal gambling, loan sharking, narcotics, securities thefts, fencing of stolen goods, prostitution rings and tax evasion.

By statistical measurement, the concept has been strikingly successful. The Justice Department says that in 1961, before the forces were established, federal enforcers were responsible for the indictments of 49 persons for organized-crime offenses. Last year, the total soared to 2,729. "In some cities we've caused a complete disruption of the syndicates," a Justice Department official says.

And IRS auditors did their share, the Justice Department says. A typical example: Labor racketeers offer a company "labor peace," or an assurance against strikes, in exchange for 100,000 shares of the company, thereby infiltrating the concern. An IRS auditor, armed with subpoena powers to examine the company's books, spots the payoff, and the racketeers are nabbed for failing to pay income taxes based on receipt of the shares.

"The auditor can see things that I as a lawyer can't see," says the director of a strike-force unit. "Proving that dirty money is being invested in clean business can be a monumental task."

Capone Case Cited

Critics argue, however, that federal law enforcers use tax evasion as a cop-out when they can't nail mobsters for more serious offenses. (The most famous example is Al Capone, the 1930s Chicago gang leader who was finally imprisoned

for failing to pay taxes on his illicit income – not for the illegal activities themselves.) But a strike-force official replies: "Our main job is to get those guys off the streets, out of operation. Hit them in the pocketbooks, if need be. This isn't fun and games; we're dealing with powerfully dangerous people."

Yes, Mr. Alexander says, but tax laws shouldn't be applied "selectively" to bag mobsters. The strike-force concept "puts the IRS in a position of setting itself as judge between good and bad in our society," he asserts. "Clearly, under such circumstances, the IRS ceases to view all taxpayers as being equal under law."

Would the IRS commissioner resign if overruled by Treasury Secretary Simon? "I don't think so," Mr. Alexander replies, taken aback by the question. After all, he says, the issue involves only 17 of the service's 15,000 auditors, one for each strike-force unit. "That's a small amount," he adds.

Mr. Alexander says his motive is clearcut: He doesn't like losing control over any of his tax men to the Justice Department or to anyone else. He feels even more strongly since the recent disclosure that IRS strike-force agents in Miami hired a woman informant to learn about the sex lives and drinking habits of prominent Floridians, including three federal judges. To the indignant Mr. Alexander, sex and booze have nothing to do with tax-law enforcement.

Just Ask, He Says

Furthermore, the IRS commissioner says anytime the strike forces want to use his auditors in individual cases, all they have to do is ask. But Henry Dogin, the Deputy Attorney General who oversees strike-force operations, claims that not having an auditor around full-time is having a "devastating

effect" in the battle against organized crime. Even he concedes, though, that the full effects won't show up for about three years, the usual time between the beginning of an investigation and its appearance in court.

Meanwhile, the Alexander stance apparently is hurting morale throughout the strike-forces and at the IRS. "If Alexander wins this one, it shows that we aren't held in such high regard," a regional strike-force official says. John J. Olszewski, 50 years old, is "retiring" as head of the IRS Intelligence Division, reportedly in a dispute with Mr. Alexander's contention that the tax agency hasn't any business snooping around for criminal offenses. Mr. Alexander says he expects some disagreement with his policies. "I would be quite surprised if all of us marched in mental lockstep," he remarks.

APPENDIX G

[Letter of John Murphy to Yigal Korren dated February 1, 1974].

JLMmfk
95-100-662

Yigal Korren, Consul
Embassy of Israel
1621 22nd Street, N.W.
Washington, D.C.

Re: Samuel Shapiro

Dear Mr. Korren:

This is in confirmation of the communication to you by telephone today informing you of the proposals made by the attorney for Samuel Shapiro upon the basis of which his client would surrender to your agent for extradition to Israel. Mr. Nathan Lewin presented the following alternative proposals:

Proposal No. 1

If Mr. Shapiro is given assurance by the Government of Israel that the prosecutor will recommend to the court in Israel that bond for his release during the pendency of the criminal proceedings there be set at no more than 100,000 Israeli pounds, Mr. Shapiro would surrender within two or three days after receiving such assurance, for transportation to Israel. A further condition of this proposal is that all conditions to which the Government of Israel had previously agreed relating to the manner in which Mr. Shapiro should be taken into custody and the manner in which he would be kept under control and supervision during the trip to Israel would

apply to his surrender pursuant to this proposal. Mr. Lewin explained that Mr. Shapiro has access to assets in Israel, such as real property owned by his relatives, which could be used by him to put up bond not in excess of 100,000 pounds.

Proposal No. 2

If the Government of Israel should consider bail in the amount of 100,000 pounds as inadequate and require bail in the amount of 250,000 pounds, Mr. Lewin proposes that the extradition of Mr. Shapiro be deferred by voluntary agreement of the Government of Israel to await the outcome of the tax proceeding now pending before the Tax Court of the United States, including any appeals to higher courts. Mr. Lewin indicated that he recognized that said tax proceeding could probably not be resolved without extended proceedings including a trial on the merits; however, he indicated his willingness to do whatever is within his power to expedite those proceedings before the tax court. Mr. Lewin's own estimate of the time which would be required to conclude the tax proceedings was indicated to be not more than six months if it is possible to expedite them.

Proposal No. 3

This proposal assumes that the Government of Israel would not be agreeable to Proposal No. 1 under which bail would be recommended in the amount of 100,000 pounds. Mr. Lewin suggested that security to the Government of Israel for the difference between the 100,000 pounds which would be tendered from sources available to Mr. Shapiro in Israel and the 250,000 pounds or such other amount as the court would set as an appropriate bond for his release would be provided by Mr. Shapiro and his wife executing appropriate instruments in favor of the Government of Israel assigning their interests in their accounts and properties owned solely

by Mr. Shapiro or jointly or by tenants by the entirety as husband and wife. The single property jointly held referred to in the discussion pertained to the home in Munsey, New York, title to which we were informed is in the names of Mr. and Mrs. Shapiro as tenants by the entirety. Under this proposal, the Government of Israel would be offered a lien on the Shapiro bank accounts and real property in the United States which have been either levied upon under the jeopardy assessment made by the Internal Revenue Service of the United States Government or against which a lien for unpaid taxes has been filed in the county in which the real property is located, such lien in favor of the Government of Israel to be subordinated to and contingent upon the lien of the United States and subordinate also to the payment of all expenses relating to the tax proceeding in the United States including attorneys fees. Mr. Lewin acknowledged that, viewed superficially, there appears to be no reason why proposal No. 1 above would be more advantageous to the Government of Israel than proposal No. 3 since under the third proposal Israel would receive as bond the 100,000 pounds specified under No. 1 and an additional source of security derived from the subordinate lien on Mr. Shapiro's assets in the United States; he points out in support of the tender of proposal No. 1 that it avoids any involvement by the Government of Israel in or contingency related to the tax proceedings pending in the United States.

The foregoing proposals were received from Mr. Lewin in our capacity as your attorneys and representatives in the extradition proceeding and pursuant to the suggestion of the Court of Appeals of the District of Columbia that Mr. Shapiro be given a further opportunity to negotiate with your Government in relation to his extradition. I am transmitting these proposals to you on behalf of Mr. Shapiro and his attorney

with the observation that the Department of Justice recommends neither their acceptance or rejection. Your Government is also assured that, should it find all of the proposals made today by Mr. Shapiro's attorney to be unacceptable, the United States Department of Justice stands ready to further represent your Government in any litigation relating to or affecting the extradition proceeding in order to bring those proceedings to an orderly and successful conclusion.

I would deeply appreciate your Government's consideration of Mr. Lewin's proposals at the earliest possible date and its early advice to this Department of its wishes in the matter.

Sincerely,

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division